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OIL AND HAZARDOUS MATERIAL CLEANUP LIABILITY: A STUDY OF LEGAL --ETC(U)

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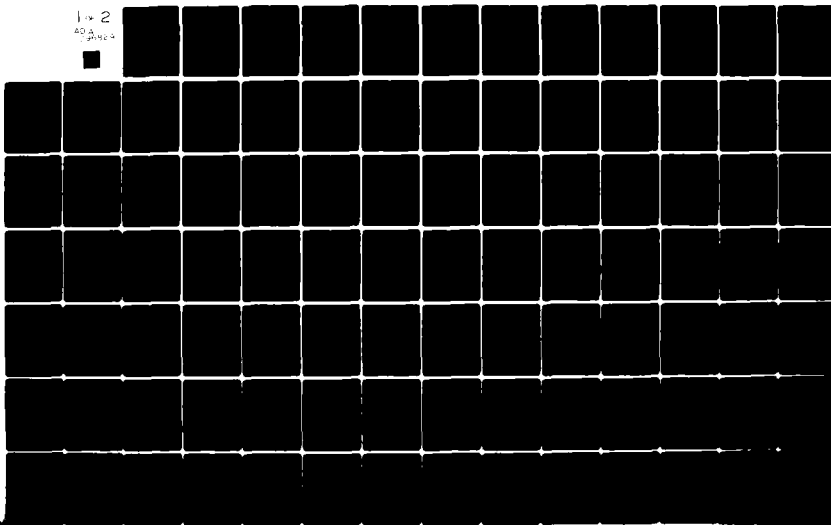
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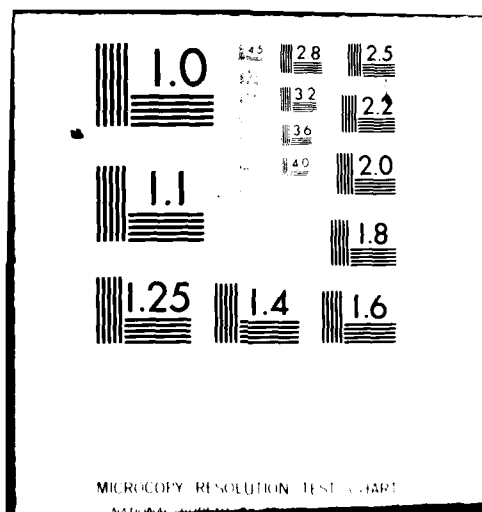
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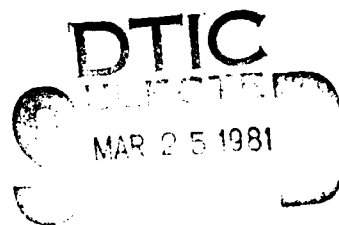
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IL AND HAZARDOUS MATERIAL CLEANUP LIABILITY:
A Study of Legal and Administrative Efficiency

J. D. Spitzer



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(6) OIL AND HAZARDOUS MATERIAL CLEANUP LIABILITY:
A STUDY OF LEGAL AND ADMINISTRATIVE EFFICIENCY.

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(10) by James David Spitzer

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Committee:

Professor William D. Drake, Chairman
Professor Richard N. L. Andrews

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INTRODUCTION

...the most desirable system of loss distribution under a strict allocation theory is one which the price of goods accurately reflect their full cost to society. The theory therefore requires, first, that the cost of injuries should be borne by the activities which caused them, whether or not fault is involved, because either way, the injury is a real cost of those activities. Second, the theory requires that among the several parties engaged in the enterprise the loss should be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.

Guido Calabresi,
"Some Thoughts on Risk Distribution
and the Law of Torts",
Yale Law Journal 70 (1961): 505

Purpose of the Study

This paper is concerned with the extent to which the dischargers of oil and hazardous substances have assumed liability for removal of these discharges under Section 311 of the Federal Water Pollution Control Act. In particular, this study shows that the law and its administration are ineffective tools for compelling the polluter to incur the costs of removal.

General BackgroundOil pollution as a problem

Although oil pollution removal has been mandated by law for only a decade, Federal laws have prohibited the discharging of oil into United States Waters for almost one hundred years. Among the first of these laws were the New York

Harbor Act of 1888¹ and the Refuse Act of 1899.² Generally, these acts prohibit the dumping of refuse of any kind or description into United States navigable waters.

It was not until the World War I years that petroleum became a significant pollution problem. Demand for petroleum was fueled by the development of the internal combustion engine and the United States was the principal producer and exporter of oil.³ The common petroleum transport container, the 42-gallon barrel, was being replaced by the bulk tankship. Ships of this type increased in number from 366 to 1,036 during the period 1914 to 1923 and oil burning ships increased from 501 to 3,348 during this same period.⁴ On a return voyage to the United States, these tanker ships usually carried no cargo. Their empty cargo and fuel tanks were ballasted with seawater so that the empty ship's propeller would be submerged and the vessel would maintain good seakeeping characteristics. This seawater ballast combined with as much as five percent of the vessel's oil cargo that was not discharged overseas. As the vessel approached port the oily-water ballast was pumped overboard to empty the tanks for a new load or cargo. This operation, together with the similar deballasting by other oilburning ships, quickly became the most significant source of oil pollution of U.S. waters.⁵

Citizen outcry and the weaknesses of the previously cited refuse acts

¹Act of June 29, 1888, Statutes at Large 25, 441 (1888) U.S. Code, vol. 33, sec. 441 (1964).

²Act of Mar. 3, 1899, Statutes at Large 30, 1151 (1899), U.S. Code, vol. 33, sec. 407 (1964).

³Encyclopedia Americana, 1976 e., s.v. "Petroleum".

⁴U.S., Department of Commerce and Labor, Bureau of Navigation, Annual Report of the Commissioner of Navigation to the Secretary of Commerce and Labor, for the Fiscal Year 1923, p. 100.

⁵U.S., Interdepartmental Comm., Report to the Secretary of State on Oil Pollution of Navigable Waters, 1926, pp. 93-94.

finally resulted in enactment of the Oil Pollution Act of 1924.⁶ Similar to its predecessor laws, however, the Oil Pollution Act simply threatened the shipboard polluter with penalties for discharging oil. Of course, discharges caused by collisions, accidents, negligence, the whims of nature, and—when convenient—by the intent of man would still occur despite the threat of penalty.

For these continuing discharges of oil, the law provided no means to mitigate whatever damage the oil might inflict. This was the case, notwithstanding the fact that the legislative history refers to the unquantified benefits of aquatic life, public health, fire prevention, and beach recreation—all of which were degraded by oil in the aquatic environment.⁷ This limitation of the law probably existed for fear of working undue hardships on industry and shipping and the lack of technology to remove a motile oil slick.⁸

Therefore, the damage inflicted by spilled oil became a social cost that was mitigated only with the passage of time as the oil was altered by evaporation, dissolution, biodegradation, and chemical degradation—eventually, stable biologic communities could reestablish themselves.

Failure of the market to allocate
the cost of pollution

Unfortunately, there are solid economic impediments to pollution abatement even when the tenor of the times encourages abatement. First, the amenities of the aquatic environment are generally public goods that can be

⁶Oil Pollution Act, Statutes at Large 43, 604 (1924), U.S. Code, vol. 33, sec. 431-37 (1957).

⁷Field, G., The Coastal Pollution Situation—A Report on the Second Conference of the Coastal Anti-Pollution League, printed in 68th Cong., 1st sess., 65 Cong. Rec., 1924, pp. 1044-45.

⁸U.S. Interdepartmental Comm., pp. 60-61.

theoretically consumed or abused by anyone at no cost, despite the fact that individuals possess no property rights to the amenities.⁹ There is an obvious conflict in the ways that this good is used by the polluter versus the use for recreation or municipal water supply. But because the navigable waters are non-market goods, there are no transactions between these conflicting users that could establish an optimal water quality to balance use requiring clean water with the costs of goods that pollute water.

Another impediment to voluntary pollution abatement is the fact that pollution is an externality--a social cost external to the inputs and outputs used for profit maximization. So, not only are public goods incapable of being allocated by market transactions, but the cost of goods produced by exploiting a public good does not accurately reflect their full cost to society. Moreover, the competitive nature of industry inhibits voluntary absorption of these external costs of pollution abatement.

These failures of the market to properly allocate resources represent a prime facie case for some sort of intervention if society desires to abate pollution. The intervention may be accomplished through governmental control with legal sanctions, judicial control with private legal sanctions; industry agreements, or some combination of these measures.¹⁰

The "polluter pays principle"

It has been just over a decade since one author observed that the oil pollution remedy of enforcing removal seemed vital.¹¹ Requiring removal

⁹C. K. Rowley, "Pollution and Public Policy," an inaugural lecture delivered before the University of Newcastle-upon-Tyne on 13 March 1973, University of Newcastle-upon-Tyne, 1973, p. 19.

¹⁰N. D. Shutler, "Pollution of the Sea by Oil," Houston Law Review 7 (March 1970): 420.

¹¹Ibid., p. 440.

not only serve to minimize the effects of oil pollution but would compel polluters to innovate more effective means of removal. Industry is in the natural position to pass removal costs along to the consumer who has "benefited" from pollution in the short run because of the "lower" cost of "necessities" and conveniences.¹²

Indeed, Congress did mandate oil pollution removal in the Water Quality Improvement Act of 1970 (WQIA).¹³ However, with the primary concern being to perform an expeditious and efficient removal, Congress authorized the President to remove or arrange for the removal unless the discharger was performing a proper removal. When the discharge was removed by the Federal government, the owner remained liable to the United States for the actual cost of removal up to certain limits of liability, and there were some exceptions for which there was no liability.

Therefore, the polluter has been given the choice of performing a proper removal or being liable to the United States for Federal removal costs. Each time a polluter decides which choice to make, he considers a unique set of incentives and disincentives that are of an ethical, legal, and economic nature. But no matter how unique the discharge is, the actual cost of removal and the standards for mitigating damage should generally be the same whether the removal is arranged by the polluter or the government. In fact, it is likely that the same contractors would be hired in either case.

On the other hand, the two options for removal differ in that the Federal removal would generally have far higher transaction costs than if the polluter himself performed or arranged for a removal. For example, there are the costs of direct government management of the contractors and the overhead of an

¹²Ibid., p. 419.

¹³Water Quality Improvement Act, Statutes at Large 84, 91 (1970), U.S. Code, vol. 33, sec. 1161 (1972).

extensive network of support equipment and the support people who contract, audit invoices, train, and manage budgets and programs. Notice that most of these services add nothing to primary program goal—to prevent and mitigate pollution damage. And of course, other services suffer when these resources are needed for Federal removals. The maximum extra transaction costs occur when the polluter refuses to pay his liability, in which case the additional expense of administrative and judicial collection costs are suffered by both the government and the polluter.

Unfortunately, most of these extra transaction costs of the Federal removal never enter into the polluter's decision of whether or not he should accept responsibility for the removal. The only costs that the polluter may be liable for are the actual removal costs. Most of the transaction costs are appropriated as agency operating costs and are not even considered as removal costs by the government. These costs, plus the removal costs that become uncollectable, are spread among the taxpayers rather than directed toward the polluting enterprise.

So, for the purpose of strict and equitable allocation of the cost of removal in addition to economic efficiency in remedying pollution damage, it is best that the polluter perform the removal or rapidly reimburse Federal removal costs if he is incapable of performing removal himself. This is simply an application of the "polluter pays principle" advocated by the Organisation for Economic Cooperation and Development.¹⁴ In fact, the WQIA and amending legislation are an application of the "polluter pays principle" to the extent that they have not been watered down by other interests.

With a basis in the preceding generalized argument, I will take the liberty of premising that: given society's desire to mitigate pollution damage, the

¹⁴Organisation for Economic Cooperation and Development, The Polluter Pays Principle, (Paris: Organisation for Economic Cooperation and Development, 1975).

removal costs and associated transaction costs will be minimized, and the costs will be more equitably distributed, to the extent that the polluting enterprise bears the costs of pollution removal. Therefore, it stands to reason that any legal solution to this problem that strives for efficiency should provide incentive to the polluter to fully incur removal costs either by performing the removal or immediately reimbursing the government for the full cost of removal. It is in this light that current law and administrative practice will be studied.

It should be noted, however, that removal may also be encouraged by concern for public relations, social conscience, or some other incentives not directly attributable to the program. In order to avoid confusing these other motives for performing removal with the program inducements, I must approach the problem from a negative perspective and focus on the situation where the polluter refuses to accept responsibility for removal costs.

After all, it is when the polluter does not accept responsibility for a removal that the administrative ire is raised and there is a contest between the ingenuity of the polluter and the loophole closing ability of the regulator. Legal and administrative inefficiency, as used in this paper, is a function of those legal and administrative characteristics whereby the polluter may avoid removal liability. Even legally sanctioned defenses or limits of liability can be considered inefficiencies to the extent that they discourage prompt action by the polluter, encourage the higher transaction costs of government intervention, or are no longer in touch with the times (such as a fixed statutory limitation of liability in periods of double digit inflation).

So the determinants of legal and administrative efficiency in this paper are the program incentives and disincentives influencing whether the polluter pays for removal, and the difficulties faced by the government in seeking reimbursement for Federal removal costs. These themes are not mutually exclusive; this study

shows there is insufficient incentive for the polluter to take responsibility for removal on his own initiative and it follows that this could increase the Government's burden as a collection agency and cleanup manager. Moreover, the Government's collection machinery is ponderously slow, or as one knowledgeable attorney noted, "I'd always want to be liable to the Government; I could fight them for years." As potential polluters and their counsels gain more experience in working with the law and learn that their liabilities can be less when the Government performs pollution removal, what legal incentive remains for the polluter to voluntarily initiate removal? The ramifications of this situation include a larger bureaucracy for managing Federal removals and attempting collections, perhaps decreased removal efficiency from excessive government support of the cleanup business, fewer incentives for private preventative measures and removal innovations, and the false responses of the market to improperly distributed pollution removal costs that are borne by the general taxpayer rather than the polluting enterprise and the direct users of the polluter's products. This paper is addressed to those aspects of the law and administrative procedure that inhibit the application of the conceptually superior "polluter pays principle".

Significance of the Study

The author of a recent article about Federal environmental policies noted that there is a tendency to pay scant attention to the inherent limits of the effectiveness of the law when we rely upon legal institutions to solve complex and pressing problems.¹⁵ This paper's exploration of these "limits of effectiveness" is of primary significance to administrators and policy makers concerned with

¹⁵James A. Henderson, Jr. and Richard N. Pearson, "Implementing Federal Environmental Policies: the Limits of Aspirational Commands," Columbia Law Review 78 (November 1978): 1428.

environmental programs.

This study is useful in several respects. First, this paper fills a void of information. I have found no previous study of this program's influence on the motivation of the polluter to pay for removal. Most work has been addressed to the more glamorous "response" aspects of the program. Second, this paper will identify inherent weaknesses in the program and recommend solutions. Third, the uniqueness of the program at its inception and its frequent use permit the program to be a valuable learning system that should be applied to the improvement of other more recent laws concerning pollution liability. A most notable example is the pending "Superfund"¹⁶ legislation which has been repeatedly introduced into Congress during the past few years. This bill purports to become a comprehensive substitute for present liability and compensation schemes including the legislation addressed by this paper. The "Superfund" would increase limits of liability, apply to hazardous dumpsites, and compensate the costs of pollution well beyond actual cleanup costs. The potential expenditures of funds would dwarf current oil and hazardous pollution expenditures, and may multiply problems of legal effectiveness correspondingly.

Delimitations

This study will be delimited as follows: It will first be limited to the subject of pollution removal as enacted in Section 11 of the WQIA of 1979 and its amendments. The study is further limited to the legal and administrative aspects of establishing the discharger's removal liability and the U.S. Coast Guard's administrative efforts to collect Federal removal costs from the discharger. Such analysis of administrative procedure will be done from a macro perspective rather than tediously describing the intricate aspects of documentation, auditing, forms,

¹⁶The most notable "Superfund" type bill in the 96th Congress is H.R. 85.

and other detailed procedural steps in the collection process.

Methods and Problems

One problem that became apparent in the early stages of this investigation is that, although the topic is focused on a narrow area of law and administration, the particular legal and administrative aspects influencing the behavior of the polluter are very fragmented and are difficult or impossible to quantify with any statistical certainty. The law, regulations, and administrative guidelines are a foundation for this study, but there is a considerable difference between this normative foundation and the actual elements of the program which have been evolving for a decade. Unfortunately, the pieces of hard evidence documenting this evolution are ambiguous and their effect on the total program is difficult to characterize.

Judicial decisions are a case in point. In addition to determining whether remedy is available to the injured party, the courts interpret the law and iron out legal ambiguities. This "judge-made law" often plays an important part in future enforcement actions. But there is no documentation or statistical compilation of that decision's influence on the numerous other incidents that are settled out of court or not pursued. Reasons for such actions are fully known only to the attorneys handling the cases. Similarly, there are numerous pieces of budgetary and other hard data relevant to the program, but not maintained in such a manner so as to allow direct correlation of statistics, the behavior of the polluter, and the pertinent facets of law or administration.

The dearth of quantitative data correlating the law and administrative practice with the polluter's behavior forces me to resort to qualitative methods to make this correlation. This has been done through researching and interpreting available legislative, judicial, and administrative data. However, much of the actual descriptive data is unpublished and is relegated to the minds of those who

are intimately familiar with the program. I collected this latter form of data by interviewing many of the key people who are charged with collecting Federal removal costs from those polluters who do not perform removal. These individuals are probably in the best position to observe the influence of the program on the polluter.

Telephone interviews were conducted with the Coast Guard legal officers who process pollution claims in each of the ten Coast Guard District Offices covering the 48 contiguous states. Personal interviews were conducted with several other attorneys working on these claims in Coast Guard Headquarters and the Justice Department. These and other interviewees are listed as a group in the Sources.

The scope of the interviews generally followed the format of the questions found in appendix 4. However, this format was not rigidly followed; it only served as a reminder to cover certain points and it permitted comparison of some opinions and administrative practices. More importantly, the interview was conducted from the interviewee's frame of reference according to Dexter's Elite and Specialized Interviewing.¹⁷ This was necessary in order to learn about the unpublished inner workings of the program and the opinions of the experts who are directly concerned with collecting removal cost claims.

Nature and Order of Presentation

Three core chapters will be used to determine the efficiency of the law and administrative practice with respect to compelling the polluter to incur removal costs. Chapter two focuses on the state of the law. Following a brief overview of historical remedies of oil pollution damage is an indepth description and analysis of the modern law of oil pollution removal liability with special emphasis on the

¹⁷Lewis K. Dexter, Elite and Specialized Interviewing, (Evanston: Northwestern University Press, 1970).

intent of the law and the forces that shaped the law. Finally, the inefficiencies of the law in compelling the polluter to pay for removal will be analyzed.

Chapter three describes the effectiveness of the administration of the law in compelling the polluter to pay. After a cursory description of the Federal response to spills, the Federal organization and procedures relative to removal cost recovery will be described and analyzed.

Chapter four provides a statistical representation of the program with emphasis on removal parties, Federal expenditures, and pertinent trends.

The final chapter offers conclusions and proposes legal and administrative measures to provide greater incentive for the polluter to incur removal costs.

Four appendices are also included for reference. The first is a copy of the 1978 codified version of Section 311, Federal Water Pollution Control Act. Appendix 2 contains the Federal regulations for administering the pollution fund to which a polluter is liable for the actual cost of a Federal removal. The third appendix consists of the Federal standards for claims collection. These standards prescribe the general administrative procedures that are used in collecting removal monies from the dilatory polluter who is liable for these costs under Section 311. Appendix 4 is a copy of the topical guideline I used to ensure covering the topic during interviews with most of the interviewed attorneys.

II

THE UNITED STATES FEDERAL LAW OF OIL AND HAZARDOUS SUBSTANCE POLLUTION REMOVAL

The purpose of this chapter is to determine the legal boundaries within which the polluter may limit his liability or be exempt from the cost of pollution removal. The initial legislation to effectively mandate removal was the Water Quality Improvement Act of 1970. The maritime industry was the principal opposition to any legislation broadening the scope of liability in any form. Therefore, these interests will be described in some detail. After describing the legislative history and the law, I will examine judicial interpretations and the interplay of other laws in shaping the polluter's liability. But first, I will briefly describe the various standards of liability, their influence on the stringency of the law, and the traditional remedies for water pollution damage.

Standards of Liability

There are three general standards of liability that the polluter may be subject to under various laws. The standard of liability largely determines the "strength" of the law or the relative ease of application of the law. In order of descending strength these standards of liability are: (1) absolute, (2) strict, and (3) fault, which is further subdivided into negligent and intentional fault.¹ To establish a cause of action under any of the three standards the plaintiff (injured

¹This discussion is based on a very good treatment of liability in N.D. Shutler, "Pollution of the Sea by Oil," Houston Law Review 7 (March 1970):427-28.

party) must show the "fact" (that there was injury) and the "cause" (the source of injury).

Where the law requires absolute liability, the plaintiff only needs to prove the "fact" and the "physical cause" in order to recover damages from the polluter.

Where the law imposes strict liability, it is still adequate to prove the "fact" and the "cause". However, once the fact and the cause are shown, the burden of proof is shifted to the polluter who may absolve himself of liability by proving a defense that the incident was the result of an "act of God", the fault of a third party, or other defenses specifically permitted by the law. The cause shown by the plaintiff must be outside of the permitted defenses and is therefore more narrowly defined than the physical cause for absolute liability. But this cause is not so narrow as the "proximate cause" that must be shown in fault liability.

Of the three standards, establishing fault liability places the greatest burden of proof on the plaintiff who must not only show the "fact" and "cause" of injury, but also show that the defendant was at fault. This rather specific "proximate cause" must be shown in order to establish that the circumstances that cause the discharge were foreseeable by the polluter. Intent or negligence are then shown to prove fault. To establish liability for intentional torts the plaintiff must prove that the polluter intended to discharge the oil. In proving negligent tort the plaintiff must prove that the polluter deviated from a reasonable standard of care, thereby breaching a duty owed to the injured party. Of course, the polluter would normally control the evidence required to show fault. In such a case, the court may apply the doctrine of res ipsa loquitur which places a burden on the polluter to prove that he was not at fault. However, a finding of guilt is not compelled even if the polluter cannot show absence of fault. Defenses such as an "act of God" or contributory negligence may still be used. Table 1 vividly illustrates the

TABLE 1
SUFFICIENCY OF DEFENSES UNDER VARIOUS STANDARDS OF LIABILITY

Defense	Standard of Liability			
	Absolute	Strict	Negligent	Intentional
-Wind or waves beyond ordinary human foresight e.g. a sudden storm	No	No	Yes	Yes
-Winds or waves constituting an "Act of God", e.g. hurricanes or tidal wave	No	Yes	Yes	Yes
-Accidental collision with the negligence of the defendant	No	No	No	Yes
-Accidental collision without the fault of the defendant	No	Yes	Yes	Yes

SOURCE: Shulter, N.D., "Pollution of the Sea by Oil," Houston Law Review 7 (March 1970): 428.

differences between these standards from the perspective of the shipowner defendant in an oil pollution case. It can be seen that the polluter is most likely to be held liable for damages if the law calls for absolute liability and he is least likely to be liable if the legal standard is intentional fault liability. The low standard of fault liability and high threshold of proof borne by the injured party are perhaps the principle inadequacies of the common law remedies in imposing liability for damages on the polluter.

Historical Remedies for Pollution Damage

The common law - an inadequate approach

The principal common law causes of action for gaining relief from pollution damage are based on trespass, negligence, and nuisance.² Some of the problems of pursuing any of these actions are the limited capabilities of an individual to gather evidence, expend time in court, and take the financial risk that a court action often entails.

Until modern times, trespass imposed strict liability on every unauthorized entry upon the soil of another. Establishing liability for modern trespass requires proof of intentional intrusion, or negligence, or some abnormally dangerous activity on the part of the defendant.³ Proving intent or negligence is normally very difficult and few activities from which an oil discharge might occur are considered to be abnormally dangerous. Even if liability could be established, the trespass requirement that the plaintiff's property be entered precludes the use of this theory by non shorefront owners.

Negligence has been the principal common law method for recovery of damages primarily because the maritime tort of oil pollution has usually required

²Ibid, p. 434.

³Wm. L. Prosser, Handbook of the Law of Torts, (St. Paul, MN: West Publishing, 1971), p. 63.

a showing of negligence or unseaworthiness (in the case of a vessel).⁴ Needless to say, the plaintiff would often carry a heavy burden of proving that the spill was caused by the defendant rather than some unknown third party.⁵ This burden may be relaxed if the plaintiff could show that the spill could not occur without the negligence of the defendant and the court applied the doctrine of res ipsa loquitur.⁶

Proving private or public nuisance can also be used to recover damages with the advantage of not having to show negligence. But there are still many defenses that must be overcome, such as establishing the source of the oil and the intent or standard of care of the polluter. Getting an injunction to abate a nuisance is likewise an inappropriate remedy in anything other than atypical chronic discharges.

In the case of oil pollution, the practical difficulties in simply identifying the polluter often overshadow the difficulties faced in court. This problem is not unique to the injured party, for the Coast Guard also faces similar difficulties in enforcing Federal anti-pollution statutes.⁷

Identification may not be a problem in a major disaster, but recovery of damages may be limited by other inadequacies of common and maritime law.⁸ First of all, the shipowner is not liable for damages to private parties resulting

⁴Shutler, p. 435.

⁵Prosser, p. 218.

⁶Shutler, p. 435.

⁷Ibid., p. 438. For example, thirty-two percent of the reported oil discharges in 1977 were from unknown or unspecified sources according to U.S. Coast Guard, Polluting Incidents in and Around U.S. Waters, 1977 and 1978, (Washington, DC: 1980), p. 8.

⁸Thomas R. Post, "Private Compensation for Injuries Sustained by the Discharge of Oil from Vessels on the Navigable Waters of the United States: A Survey," Journal of Maritime Law and Commerce 4 (October 1972): 44.

from a seaworthy vessel encountering an extraordinary peril which causes the discharge. Even if this is not the case, the plaintiff normally has the burden of proving otherwise—that there was intent or negligence or unseaworthiness. Second, a shipowner's liability is limited to essentially nothing if the ship and cargo are lost. This limitation of liability will be discussed later in the chapter. Of course, no matter what damages are awarded by the court, or what limits of liability are set, recovery could be limited if the polluter is bankrupt, has an inadequate income, or simply disappears.

Common law is certainly not an adequate means of compelling the polluter to pay for removal costs.

Pre-1970 statutory law

Prior to 1970 there was no "effective" legislation calling for the polluter to be liable for removal costs. Although the 1966 amendments to the Oil Pollution Act of 1924 purported to require removal, it was a useless law for reasons that I will describe shortly.

As mentioned in the introductory chapter, the Oil Pollution Act of 1924 was the first comprehensive Federal legislation designed to specifically prohibit oil discharges into the coastal navigable waters of the United States.⁹ The Act applied only to discharges from ships, the principal source of oil pollution. Discharges from shore facilities had to be prosecuted under the Oil Pollution Act's similarly constructed predecessor laws, the New York Harbor Act of 1888 and the Refuse Act of 1899. If it could be shown that the oil came from a particular vessel, the Oil Pollution Act made the polluter strictly liable for the statutory penalties unless he could prove that the discharge was the result of an "emergency" or

⁹Harvard International Law Journal, "Oil Pollution of the Sea," Harvard International Law Journal 10 (1969): 338.

"unavoidable" discharge.¹⁰ The discharger who could not prove these defenses was subject to fine and/or imprisonment; however, there was no statutory obligation to mitigate the damage.

The Oil Pollution Act served as the basis for prosecution in over 100 cases per year¹¹ before it was amended by the Clean Water Restoration Act of 1966.¹² This amendment was introduced as S.2947 by Senator Edmund Muskie (D.-Maine) and it represents the first time Congress dealt with controlling oil once it was discharged. The Act required persons discharging, or permitting the discharge, to "immediately" remove the oil from the navigable waters and shorelines. Where removal was not forthcoming, the Secretary of the Interior was authorized to arrange for removal and the discharger was liable for the costs of removal.

As passed from the Senate, S.2947 provided that anyone responsible for oil pollution would be absolutely liable for any costs incurred by the Federal government in removing oil. But S.2947 was gutted in Conference Committee. When it emerged, not only was the absolute liability provision eliminated, but the bill required a showing of gross negligence for recovery of removal costs and conviction for the discharge.¹³ This difficult burden of proof made the law essentially unenforceable and the Coast Guard was limited to bringing enforcement actions under the old Refuse Act which imposed a strict liability standard but contained no removal provisions.¹⁴

¹⁰Oil Pollution Act, (1924).

¹¹Harvard, p. 339.

¹²Clean Water Restoration Act, Statutes at Large 80, 1246 (1966).

¹³Allan I. Mendelsohn, "Marine Liability for Oil Pollution—Domestic and International Law," George Washington Law Review 38 (October 1969): 3.

¹⁴Shulter, p. 433.

The Water Quality Improvement Act of 1970 and Amendments

The previous section documented the inadequate legal remedies to collect pollution damages and the impotence of the only existing law that mandated pollution removal. This state of the law, along with a pressing desire by society to mitigate pollution damage, gave rise to the legislation to be described in this section. A straightforward description of the law will be preceded by a discussion of the background of the law that emphasizes the principal interests shaping the law.

History of the legislation

It is not necessary for this paper to comprehensively describe the complicated blend of international, national, and commercial interests that shaped the 1970 legislation. This historical discussion will be focused on those "actors" who were probably the strongest proponents and opponents of any legislation increasing oil pollution liability. On the proponent side was Senator Edmund Muskie and his Subcommittee on Air and Water Pollution of the Public Works Committee. In opposition to increased liability was the maritime insurance industry which spoke for the marine industry in general. The reason for this marriage of insurance and shipping is that hand-in-hand with increased liability is the insurability of the risk as the following quote illustrates:

The responsible and competent management of a business includes the protection of the stockholder's investment and all capital expenditures. No responsible business takes uninsurable risks.¹⁵

Although the resultant pollution removal law applied to all sources of oil pollution, the maritime industry will be emphasized because it stood to lose the most with increased liability for several reasons. First, vessels were regarded as

¹⁵W. Ken Elkins, "Insurance, Liability, and Penalties," paper presented at the Maritime Transportation Research Board of the National Academy of Science Workshop on Reducing Tankbarge Pollution, 15 and 16 April 1980. (Typewritten).

the primary source of oil pollution.¹⁶ Second, vessel source pollution presented the injured party with some unique problems in recovering damages. While recovery from a corporation is normally limited to corporate assets, the considerations of limitations are more complex in the case of vessels.¹⁷ Among these considerations are the transient nature of vessels including problems of obtaining jurisdiction over a vessel or its owner. More importantly, United States vessel owners enjoyed a statute that limited their liability to what was often a very low amount. The following quote is one person's profound impression of maritime laws which limit liability:

Encrusted with centuries of tradition, antiquated statutes, and two international treaties, the sea laws of limitation challenge the intelligence of even the most arduous and dedicated lawyers. It is no wonder, therefore, that change is and always has been so slow to come about. For those without a vested interest in these laws seldom understand them, and those with a vested interest understand them but seldom wish to see them changed.¹⁸

In order to understand the sources of many of the weaknesses of the present law of removal liability, it is necessary to see the roots of the maritime industry's opposition to the law. This will be done in three areas. The first area covers the development of the marine insurance industry and the growing concern to protect against liability risks. The second describes the vessel owner's limitations of liability with respect to pollution damage. The last area covers the salient points of the industry's opposition which undoubtedly limited the strength

¹⁶U.S. Department of Interior and Department of Transportation, "A Report on Pollution of the Nation's Waters by Oil and Other Hazardous Substances," (1968), p. 6.

¹⁷Leonard F. Alcantara, "Laws and Private Agreements with Respect to Liability for Oil Spills," paper presented at the American Law Institute - American Bar Association Course of Study - Oil Spill and the Law, Miami, FL, 17 and 18 April 1980, p. 277.

¹⁸Allan I. Mendelsohn, "The Public and Private International Maritime Law," William and Mary Law Review 10 (Summer 1969): 789.

of the enacted legislation.

The marine insurance industry

The practice of insuring against liability for environmental damages or removal costs is of very recent origin. The Protection and Indemnity (P&I) insurance that offers this coverage against third party liabilities grew out of necessity from the inadequacies of the marine insurance industry. This industry, in turn, was developed in Great Britain in a climate of many political and commercial influences. In fact, until the middle of the nineteenth century third party liabilities had not presented a serious problem to vessel owners. The marine insurance field was generally limited to cargo insurance taken out by the shipowner against loss or damage to his ship.¹⁹ It was in the seventeenth century that the original marine insurers gathered at Lloyd's coffee house in London to "underwrite" maritime venture.²⁰ As Lloyd's of London and the insurance industry developed, groups of shipowners, particularly those residing outside of London, formed Mutual Hull Associations to mutually insure their hull risks rather than pay higher prices and suffer the inconveniences of dealing with London underwriters.²¹

Hull coverage was limited as were the potential liabilities of the shipowner. For example, the early 1800's hull policies did not cover collision damages as a collision was not considered to be a "peril of the sea".²² There was generally no conception that a ship owner should be liable to the cargo owner, to crew members and passengers, or to property owners damaged by his ship.²³ Common law

¹⁹Wm. R. A. B. Reynardson, "The History and Development of P&I Insurance: The British Scene," Tulane Law Review 40 (April 1969): 464.

²⁰Robert H. Brown, Marine Insurance: The Principles, (London: Witheby, 1968), p. 9.

²¹Reynardson, p. 468.

²²*Ibid*, p. 468.

²³*Ibid*, pp. 464 65.

responsibility for damage to cargo was effectively avoided by release-from-liability provisions in the contracts for carriage. The common law did not even allow private remedy for fatal injuries.²⁴ Consequently, there was little threat of liability to third parties and whatever risk did exist was borne by the individual shipowner.

In the middle of the nineteenth century, the shipowner saw an enormous increase in liability that coincided with the coming of the industrial revolution and increases in numbers of vessels, cargo carried, and immigrants sailing to North America. The underwriters refused to cover these risks and Mutual Associations of shipowners were formed to share these added risks of liability.²⁵

These mutual insurers are called Protection and Indemnity (P&I) associations or clubs. They were first formed to cover the protection aspects of liability such as loss of life and personal injury, collision liability, damage to piers, and wreck removal.²⁶ The need for indemnity became apparent when cargo owners and insurers actively recognized their rights of subrogation in cases where loss or other liabilities were caused by negligent navigation or some other causes not attributed to a "peril of the sea".

Most P&I insurance was, and still is, provided through associations in the London market. In fact, there was no demand for American P&I insurance until World War I created a demand and the British government prohibited the London market from fulfilling it because of America's neutrality.²⁷ Even recently, of the

²⁴Raymond H. Kier. "The Effect of Direct Action Statutes on P&I Insurance, on Various Other Insurances of Maritime Liabilities, and on Limitation of Shipowners' Liability," Tulane Law Review 43 (April 1969): 644.

²⁵Reynardson, p. 465.

²⁶Ibid., p. 468.

²⁷John P. Kipp, "The History and Development of P&I Insurance: The American Scene," Tulane Law Review 43 (April 1969): 476-77.

sixteen major associations across the world²⁸ the only American P&I association represents only 2 percent of the world fleet.²⁹ In contrast the twelve associations that form the "London Group" represent over 70 percent of the world's shipping tonnage.³⁰

The shipowners and charterers of each association mutually share whatever liability a member becomes subject to up to a certain amount called the retention point. For liability in excess of this point, the association seeks reinsurance. In the London group, liability above a certain point is pooled among the twelve associations according to the vessel tonnage represented by each association.³¹ This group coverage also has a retention point, beyond which reinsurance is sought on the world market through a management firm. The retention point fluctuates with respect to the supply and demand for reinsurance on the world market.³² The reinsurance underwriters also have an upper limit of liability beyond which the risks are shared by the P&I Clubs.³³

The individual shipowners insurance rate varies considerably according to criteria such as age, type, condition of vessel, nature of cargo, past record, and so on. This rate is collected through advance "calls" that are also based on the association's costs for the past five years. If this budget is exceeded, say because

²⁸R. Michael M'Gonigle and Mark W. Zacher, Pollution, Politics, and International Law: Tankers at Sea (Berkeley: University of California Press, 1979), p. 375.

²⁹"American P&I Continues to Grow." Fairplay International Shipping Weekly, 15 April 1976, p. 71, cited in M'Gonigle, p. 375.

³⁰M'Gonigle, p. 375.

³¹*Ibid.*

³²Mendelsohn, Marine Liability, pp. 4-5.

³³M'Gonigle, p. 375.

of major disaster, supplementary calls are made to the members.³⁴

It is interesting to note the dependency of the associations on the fluctuating reinsurance market. When reinsurance is readily in supply the retention points are low and the reinsurer bears a greater part of the risk. When reinsurance is scarce, the retention point is higher so the associations, and in turn the members, bear a greater risk. It is obvious that the statutory limitations of liability serve to eliminate risk beyond a certain point and the removal of these limits would increase the risks of loss and raise the retention point.

Limitation of Liability Act of 1851

One reason that the demand for American P&I coverage has lagged is the Limitation of Liability Act of 1851.³⁵ Congress was made aware of the need for Federal limitations when the owners of the steamboat Lexington were held liable for \$18,000 in coin lost when the boat burned through the negligence of her crew.³⁶ This holding was seen as a threat to the ability of the United States merchant marine and shipping industry to grow and compete with English shipping. An owner's entire fortune could be at stake when he invested in a maritime venture that could not only be jeopardized by a crew over whom he had little control, but also by the perils of the sea. Today's internationally accepted means for limiting liability, incorporation, was not yet practiced.³⁷

The Act allowed the owner to limit liability to his "interest" in the vessel

³⁴Ibid., pp. 375-76.

³⁵Shipowner's Limitation of Liability Act, Statutes at Large 9, 635 (1851), U.S. Code, vol. 46, sec. 181-89 (1976).

³⁶Kier, p. 641; New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. (6 How.), 344 (1848).

³⁷U.S., Congress, Senate, Committee on Commerce, Science, and Transportation, Oil Pollution Liability and Compensation. S. Rept. 427, 95th Cong., 1st sess., 1977, p. 5.

and her freight then pending. This limitation applied to: (1) loss or destruction of goods on board; (2) damage by collision; and (3) any other damage or forfeiture which occurred without the owner's privity or knowledge.

The potency of the Act was fixed in Norwich Co. v. Wright in 1871 when the Supreme Court held that the Act limited the owner's liability to his interest in the vessel after the collision, not before.³⁸ This interest was the extent of the limitation fund that could be disbursed among creditors. In the 1886 The City of Norwich case, it was held that the proceeds from a hull insurance policy were not part of the owner's interest in the vessel and need not be placed in the limitation fund.³⁹

With respect to property loss, the Limitation Act remains unchanged to this day. The 1967 foundering of the Liberian supertanker Torrey Canyon, and the subsequent catastrophic discharge of oil into the coastal waters of France and Great Britain are an oft-used example of the glaring inequity that may be fostered by this Act. In limitation proceedings, a United States Federal district court held that the remaining value of the vessel and her cargo was \$50.00—the value of one salvaged lifeboat. As a result, the vessel's American owner was permitted to file a limitation of liability petition for \$50.00⁴⁰ in the face of \$16 million in quantifiable costs for pollution control and prevention.⁴¹ If the casualty had occurred off the United States coast this ridiculously low limitation may have been sustained—especially since the United States was not signatory to the widely

³⁸ Norwich Co. v. Wright, 80 U.S. (13 Wall.), 104 (1871).

³⁹ The City of Norwich, 18 U.S. 468 (1886).

⁴⁰ In re Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968).

⁴¹ P. Burrows, C. Rowley, and D. Owen, "The Economics of Accidental Oil Pollution by Tankers in Coastal Waters," Journal of Public Economics 3 (August 1974): 258.

accepted 1957 Convention on the Limitation of Liability which set property liability at about \$67 per ton of the ship's tonnage.⁴² Even so, Great Britain and France ultimately recovered less than one-half of their quantified removal costs.⁴³

Traditional limitation of liability
versus pollution removal liability

The purpose of this topical area is to describe some of the principal issues and positions brought out in the course of three years of legislative process that finally came to fruition with the enactment of Section 11 of the Water Quality Improvement Act (WQIA) of 1970. This legislation was shaped in the course of numerous Congressional hearings by lobbying interests as well as by the public concern over pollution disasters such as the Torrey Canyon grounding in 1976 and the Santa Barbara offshore well blowout in 1969. No attempt is made to comprehensively describe this legislative history; I will simply describe the salient issues and positions brought forward by what are probably the key actors influencing this legislation; the insurance industry as an opponent of removal liability and Senator Muskie as a proponent. The observations made by Washington, D.C., attorney Allan E. Mendlesohn are a key source for this discussion.⁴⁴

A movement toward generally increased liability for shipowners was surely no surprise to maritime interests. As early as 1960, Chairman N. J. Healy III offered the following warning of what would happen if the insurance industry

⁴²M'Gonigle, p. 145.

⁴³Ibid., p. 153.

⁴⁴Mendelsohn, "Marine Liability", pp. 1-31. As an attorney with the office of the Legal Advisor of the Department of State, Mendelsohn was a U.S. Government delegate to every major international conference on private, international, and maritime law from 1963 to 1969.

rigidly supported the antiquated limitation of liability laws:

. . . if steps are not taken to liberalize our limitation of liability laws . . . there is going to be public clamor for a law which will do away with limitation in its entirety and, therefore, if we want to preserve limitation in order to encourage investment in shipping, we should try to keep up with the times and enact amendments which will make limitation more acceptable to the courts and the public at large.⁴⁵

Indeed, when faced with a potent legislative threat to limitations the insurance industry did grudgingly favor moderate liberalization of the limits.

Nevertheless, given the strength of the predominantly foreign-based marine insurance industry, together with the drastically low limits of liability enjoyed by American shipowners, the stage was set for vigorous opposition to any proposed increase in liability. The impetus for removal liability came on the heels of several spectacular oil spills in the late 1960's. These spills focused the attention of the world on the problem and galvanized legislatures into action. On April 20, 1967, a month after the Torrey Canyon disaster, Senator Muskie introduced S.1591 with the sole purpose of removing the test of gross negligence which crippled the effectiveness of the Oil Pollution Act Amendments of 1966.⁴⁶ Although no relevant legislation was passed until 1970, the hearings on S.1591 began to reveal several deeply set inadequacies in the state of United States pollution law including the statutory limitations of liability for vessel owners.⁴⁷ In light of the facts developed during these hearings, there followed a group of bills that amounted to an assault on the 1851 statutory limitations as they applied to

⁴⁵N.J. Healy III, address to Association of Average Adjusters of the United States, 1960 Annual Report, pp. 313-14, cited in "Shipowners Limited Liability," Columbia Journal of Law and Social Problems 3 (June 1967): 109.

⁴⁶U.S., Congress, Senate, Committee on Public Works Hearings on S.1591 and S.1604 Before the Subcommittee on Air and Water Pollution Control, 90th Cong., 1st sess., 1967, p. 3.

⁴⁷Mendelsohn, "Marine Liability", p. 3.

pollution and property damage.⁴⁸

The subject of limitation to liability came into Congress through the back door. It was raised not through the ordinary channels of the Senate Commerce or House Merchant Marine Committees, but by the Senate Public Works Committee whose original objective was not to modernize maritime limits of liability, but rather to assure expeditious cleanup of oil spills—and not at the expense of the public treasury.⁴⁹ It was only after becoming deeply involved in the problem that Muskie's committee realized how the 1851 statute operated and how it could impede expeditious cleanup by a vessel owner and preclude recovery of damages by injured parties. Several other committees did become involved in this issue—more than likely at the behest of the marine industry which was disturbed by the reception it received from the Muskie committee.⁵⁰ In fact, there was a detailed memorandum circulated on Capitol Hill that discussed the problem and concluded that jurisdiction should be vested in the Merchant Marine and Fisheries Committee.⁵¹ Mr. Mendelsohn surmised that in light of the past inability of this committee and the Senate Commerce Committee to produce any forward looking legislation on liability limits, it was inevitable that the vacuum would sooner or later be filled by some other committee.⁵² Indeed it is a credit to our diffused legislative authority when an independent legislator can develop his own national environmental constituencies and tread on such sacred ground.

⁴⁸Included in the "assault" were S.2760, S.3206, H.R.15906, and H.R.14000 of the 90th Congress and S.7, S.544, H.R.4148, H.R.7361, and H.R.6495 of the 91st Congress.

⁴⁹Mendelsohn, "Marine Liability", p. 8.

⁵⁰Morrison, "Shipping Industry Irked on Pollution Hearings," Journal of Commerce (3 June 1969): 11, cited by A. I. Mendelsohn, Marine Liability, p. 2.

⁵¹Mendelsohn, "Marine Liability", p. 4.

⁵²*Ibid.*, p. 2.

The 90th Congress. Senator Muskie's Subcommittee on Air and Water Pollution conducted hearings in June, 1976, on S.1591 and S.1604. As introduced these bills simply purported to correct the fault of the 1966 amendments by changing "gross" discharge to "accidental" discharge. However, the hearings were underscored by the higher aspirations of exploring aspects of pollution prevention and assuring recovery of damages.⁵³ To this latter end the maritime industry was concerned that the contemplated accidental discharge liability was inequitable in that the shipowner could be held responsible for discharges for which he had no fault. Senator Muskie retorted that the parties injured certainly had no fault and who should remedy their damages?⁵⁴ One response of industry was that the government should incur these costs. Furthermore, the industry also wanted Congress to wait until the Intergovernmental Maritime Consultative Organization (IMCO) had thoroughly studied the subject and the industry did not want the U.S. to act unilaterally.⁵⁵

In these first hearings, shipping and petroleum interests comprised the opposition to any added liability for the polluter. It was in forthcoming hearings that Muskie's committee saw how the archaic 1851 Act stood in the path of increasing liability and that a formidable marine industry stood behind the Act.

The assault on the 1851 limitations began when S.1591 was merged into S.2760 and passed by the Senate in December, 1967. Under S.2760 the vessel owner would be strictly liable for the full costs incurred by the Federal government in removing the discharge. The owner could avoid liability only by

⁵³U.S., Congress, Senate, Committee on Public Works, p. 1.

⁵⁴Ibid., p. 20.

⁵⁵Statement by W. C. Brodhead, Chairman of the American Petroleum Institute's Central Committee on Transportation by Water, cited U.S., Congress, Senate, Committee on Public Works, Hearings on S.2760 Before the Senate Subcommittee on Air and Water Pollution, 90th Cong., 1st sess., 1967, p. 217-18.

proving that the discharge was due to an "act of God."⁵⁶ S.2760 was identical to H.R.14000 which was then being considered by Congressman Fallon's (D-Md.) House Public Works Committee.

The maritime insurance industry's perspective began to be aired at the hearings on H.R.14000. Two key industry witnesses made their first of several appearances before the three Congressional committees looking at the problem. John C. Shearer and Peter N. Miller were both associated with the London firm of Thos. R. Miller & Son. Mr. Shearer and Mr. Miller managed and perhaps controlled the major part of the world's P&I coverage available to vessels. The Miller firm managed the largest of the London Group P&I associations and also placed the London Group's reinsurance on the world market. Mr. Shearer appeared for the London Group and Mr. Miller, who placed reinsurance for the Group, testified for the Reinsurance Underwriters.⁵⁷

Both Mr. Miller and Mr. Shearer testified that the maximum amount of coverage available on the world insurance market was between \$10 million and \$15 million, and therefore the unlimited liability called for by S.2760 and H.R.14000 would be uninsurable. A reason for these ceilings on available insurance coverage was that the bills essentially called for absolute liability;⁵⁸ this was the most liberal view of liability. The American Petroleum Industry recommended a liability limit of \$250 per ton up to a maximum of \$8 million⁵⁹

⁵⁶U.S., Congress, Senate, A Bill to Amend the Federal Water Pollution Control Act. . . , and to Prevent Pollution of Water by Oil, S.2760, 90th Cong., 1st sess., 1967.

⁵⁷Mendelsohn, "Marine Liability", pp. 4-5.

⁵⁸U.S., Congress, House, Committee on Public Works, Hearings on H.R.15906 and Related Bills Before the House Committee on Public Works, 90th Cong., 2d sess. 1968, p. 405.

⁵⁹Ibid., pp. 362-63.

while the U.S. flag vessel owners recommended that no unilateral action be taken unless international efforts failed.⁶⁰

In October, 1968, the results of the efforts of the 90th Congress to increase liability emerged in the form of the House amendments to S.3206.⁶¹ S.3206 was introduced by Senator Muskie. The bill originally dealt with liability limitations as they were previously set forth in the Senator's subcommittee hearings on S.2760. However, S.3206 had been amended by the House Public Works Committee to meet the most conservative demands of industry. The full cleanup cost liability proposed by S.2760 and H.R.14000 was now limited to \$67 per gross ton up to a maximum of \$5 million—far less than proposed by the London Group and the American Petroleum Institute. The public record does not disclose the reasons for adopting these figures; however, the \$67 per ton figure had been adopted by the 1957 Brussels Convention on Shipowner Limitation which was not ratified by the United States.⁶² Absolute liability was also eliminated and in its place S.3206 required liability to be based on a presumption of fault, in which case the burden was on the polluter to show an absence of fault. This was hardly an improvement over the 1966 amendments. With the closing of the 90th Congress and the imminent November elections, there was no time to iron out remaining differences and the bill died.⁶³

On January 7, 1969, the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) was initially signed by the seven major oil

⁶⁰Ibid., p. 390.

⁶¹U.S., Congress, House, Committee on Public Works, Water Quality Improvement Act of 1968, H. Rept. 1946, 90th Cong., 2d sess., 1968.

⁶²Mendelsohn, "Marine Liability", p. 6.

⁶³Ibid., p. 7.

companies.⁶⁴ TOVALOP was an industry agreement to provide limits of liability of \$100 per gross ton up to a maximum of \$10 million for member's tankships. Coverage was limited to government cleanup costs only. Furthermore, liability was based on a presumption of negligence as in S.3206. The timing of the industry agreement and its modest terms suggest that its main purpose was to preempt or at least to temper more pervasive changes expected from the 91st Congress and international conventions.

The 91st Congress. With the opening of the 91st Congress and the Santa Barbara offshore well blowout in 1969 came a rush of bills to address the oil pollution and liability problem. The bills represented a wide range of limitations and most called for fault rather than absolute liability. On the lower end of the scale, limits identical to TOVALOP (\$100/gross ton and \$10 million maximum) were proposed by H.R.6495 which was introduced by Committee Chairman Garmatz (D.-Md.) and went before his Merchant Marine Fisheries Committee. The higher extreme was represented by Senator Muskie's S.7 and S.544 which among other things called for limits of \$450 per gross ton and a maximum of \$15 million. The political process and industry efforts had certainly tempered efforts to legislate the ultimate imposition of liability on the industry—that of absolute and unlimited liability.

During the Muskie Subcommittee's first hearings on S.7 and S.544, Messrs. Shearer and Miller again testified for the international insurance interests. Although the bills provided for presumption of negligence and maximum liability of \$15 million, industry continued to hold that that amount was uninsurable, the market capacity could not exceed \$12 to \$15 million, and the capacity had

⁶⁴David William Abecassis, The Law and Practice Relating to Oil Pollution From Ships (London:Butterworths, 1978), p. 235.

decreased further in the past year.⁶⁵ Indeed, the London Excess P&I Underwriters (reinsurers) had responded to the threat of legislation by serving notice that they reserved the right to cancel, on 30 days notice, all oil pollution liability insurance in the event of new United States legislation regarding liability for oil pollution or shipowner limitations of liability.⁶⁶ Another reason that the limits were said to be uninsurable was that the per ton limitation was too high and would cause claims to reach the ceiling figure too frequently.⁶⁷ This latter reason is interesting because it was not confirmed by statistics presented by Mr. Shearer. He showed that the \$450/\$15 million limits were not necessary because the twenty-nine oil pollution claims paid in the past seven years averaged under \$8,500 and that the largest was only \$500,000 (Torrey Canyon excepted); no losses in excess of \$67 per gross ton were recorded.⁶⁸ Therefore, it was argued that any expansion in the legal regime of liability was unnecessary.⁶⁹ Indeed, prior to 1967, oil pollution liability was insignificant and not even categorized separately. Costs for all P&I coverage were only about 15 percent of the cost of hull insurance alone.⁷⁰ Why then did the insurance industry object to the \$450/\$15 million limits? Mr. Miller implied that since the Torrey Canyon, the underwriters did not view the risks as

⁶⁵U.S., Congress, Senate, Committee on Public Works, Hearings on S.7 and S.544 Before the Senate Subcommittee on Air and Water Pollution, 91st Cong., 1st sess., 1969, pp. 141 and 156.

⁶⁶Stanley R. Wright, "Liabilities (1) Arising out of Collision with Another Vessel and not Covered by the Hull Policy, (2) For Damage to Another Vessel or Her Cargo, not caused by Collision with the Insured Vessel, (3) For Damage to Any Object or Property Except Another Vessel or Her Cargo," Tulane Law Review 46 (April 1969): 577-80.

⁶⁷U.S., Congress, Senate, Committee on Public Works, Hearings on S.7 and S.544, p. 153.

⁶⁸*Ibid.*, p. 154.

⁶⁹*Ibid.*, p. 141.

⁷⁰*Ibid.*, p. 164.

very small as suggested by Mr. Shearer. On the contrary, they saw that type of incident being repeated because of the recent trend toward vastly larger ships and the increased carriage of crude oil.⁷¹

A different objection was raised by Mr. Kreuzkamp, who testified for the Marine Brokers.⁷² He said that American companies were not interested in providing reinsurance because of poor experience and the capacity of the London market was becoming increasingly limited. He contended that even limits of \$67 per gross ton would seriously reduce market capacity and restrict the ability of the American shipowner to purchase sufficient insurance.

Shortly after the Muskie hearings were recessed, the House Committees on Public Works and Merchant Marine opened hearings on related bills.⁷³ Both committees leaned toward the TOVALOP limits of \$100/\$10 million.⁷⁴

In the second Muskie hearings, Mr. Miller lowered previously endorsed limitations by stating that the TOVALOP limits of \$100 per gross ton and a \$10 million ceiling were now the maximum insurable ceilings. And the liability had to be predicated on a presumption of the fault system⁷⁵ which is similar to fault liability with res ipsa loquitur.⁷⁶ Mr. Miller insisted that if absolute liability was

⁷¹Ibid., p. 155.

⁷²Ibid., p. 158.

⁷³U.S., Congress, House, Committee on Public Works, Hearings on H.R.4148 and Related Bills Before the House Committee on Public Works, 91st Cong., 1st sess., 1969; and U.S., Congress, House, Committee on Merchant Marine and Fisheries, Hearings on H.R.6495, H.R.6744, and H.R.7325 Before the House Committee on Merchant Marine and Fisheries, 91st Cong., 1st sess., 1969.

⁷⁴Mendelson, "Marine Liability", pp. 13-14.

⁷⁵U.S., Congress, Senate, Committee on Public Works, Hearings on S.7 and S.544, p. 153.

⁷⁶Mendelsohn, "Marine Liability", p. 19.

adopted, the maximum market capacity would shrink to \$5 million.⁷⁷ These proposals were characterized as "insurance trail blazing".⁷⁸ This "pioneer spirit" must refer specifically to the marine insurance industry because testimony from the aviation insurance agency revealed that jumbo jets were insured for as much as \$50 to \$100 million with absolute liability.⁷⁹

Another reason for opposition to absolute liability was propounded by James Reynolds, President of the American Institute of Merchant Shipping.⁸⁰ He was fearful that the concept of absolute liability for oil pollution would spread to cases of injury or death regardless of fault, to cargo damage, to property damage, and so on.

After three years of legislative effort and debate, an effective law mandating polluter liability for removal costs incurred by the Federal government was passed and the 1851 Act was preempted insofar as removal liability was concerned. The arguments of industry certainly had a great impact on the establishment of limitations of liability at a level far below absolute liability with no limits. Congress was in no position to refute many of the claims from the insurance experts about the limits of insurability. And Congress could hardly force limits of liability on an industry that thought them to be excessive and was predominantly foreign based.

Table 2 shows the principal liability features of the final bills of the House and the Senate, and the Conference substitute which was passed as Section 11 of

⁷⁷U.S., Congress, Senate, Committee on Public Works, Hearings on S.7 and S.544, p. 1372.

⁷⁸*Ibid.*, p. 1368.

⁷⁹Mendelsohn, "Marine Liability", p. 19.

⁸⁰U.S., Congress, Senate, Committee on Public Works, Hearings on S.7 and S.544, p. 1466.

TABLE 2
POLLUTER'S LIABILITY FOR FEDERAL POLLUTION REMOVAL
UNDER THE HOUSE AND SENATE BILLS AND
THE CONFERENCE SUBSTITUTE

Bill	Type of Discharge	Limitation of Removal Liability		Unlimited Liability when
		Vessel	Facility	
House H.R.4148	willful or negligent	\$100/\$10 million	\$8 million	n/a
Senate S.7	all discharges except when caused by act of God, 3rd party or U.S.	\$125/\$14 million	\$8 million	willful or negligent
Conference Substitute H.R.4148	all discharges except then caused by act of God, act of war, 3rd party	\$100/\$14 million	\$8 million	willful negligent or willful misconduct with privity of owner

SOURCE: U.S. Congress. Statement of the Managers on the Part of the House. Conf. Rept. 940 to Accompany H.R.4148, 91st Cong., 1st sess., 1970.

the WQIA of 1970. The House bill was very conservative in that it made the polluter liable for the removal costs up to the TOVALOP limits for only willful or negligent discharges. The Senate version extended greater liability to all discharges except where a defense could be shown. These limitations could be broken if the discharge was willful or negligent (no fault or intent needed to be shown to prove simple negligence). The conference substitute was a compromise with the most significant change being that the limits could be broken only by showing the intent of negligence or misconduct—a very difficult task.

Removal liability of the WQIA of 1970 and amendments

This subsection will outline those provisions of the law directly related to the polluter's liability for pollution removal costs incurred by the Federal government. Appendix 1 contains an up-to-date copy of the law as codified in 33 U.S. Code Section 1321. Rather than footnote references to specific provisions of the law, I will put the particular clause in parentheses. Although Section 1321 is Section 11 of the 1970 Act and Section 311 of the subsequent amendments, the lettered clauses correspond to the subject matter from one amendment to the next and to the codified law.

Before describing the removal aspects of the law, it is important to note that these removal liability provisions are viable only through the support of related provisions of the law that are not covered in detail by this paper. Supporting provisions define prohibited discharges ((b)), require that discharges be reported ((b)(5)), penalize the polluter ((b)(6)), authorize Federal removal actions ((c)(1)), establish a pollution fund for Federal removal ((k)), authorize administration of the law ((1)), etcetera.

The act also contains provisions for prohibiting the discharge of hazardous substances and establishing the polluter's liability. These provisions have little relevance to this study and will be glossed over because they did not become

effective until late 1979,⁸¹ when the Environmental Protection Agency finally published regulations identifying substances, by type and amount, that are considered hazardous.

Section 11 of the WQIA of 1970 made the polluter liable to the United States for "... its costs incurred ... for the removal of oil ..." ((f)(1)). There is no liability if the owner or operator "can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing causes" ((f)(1)). On the other hand, liability for removal costs is unlimited if the United States can show that the "discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner" ((f)(1)). If the owner cannot prove one of the excepted causes and the United States cannot show willful negligence or willful misconduct, the liability for removal costs is limited. In the case of a vessel, liability is "... not to exceed \$100 per gross ton of such vessel or \$14 million, whichever is lesser" ((f)(1)). A facility owner or operator's liability is limited to \$8 million ((f)(2)). Action may be brought against the owner or operator in any competent court and, in the case of a vessel, removal costs are also to be a maritime lien on the vessel recoverable in an action in rem against the vessel ((f)(1), (2), and (3)). The above provisions also define the liability of a third party who caused the discharge ((g)).

Section 11 was amended by Section 311 of the Federal Water Pollution Control Act (FWPCA) of 1972.⁸² The law was modified to add liability for the

⁸¹Designation of Hazardous Substances, Code of Federal Regulations, 40, pt. 116, Federal Register, vol. 44, 66601 (20 November 1979).

⁸²Federal Water Pollution Control Act, Statutes at Large, 86, 806 (1972), U.S. Code Annotated, vol. 33, sec. 1321 (1973).

cleanup of hazardous substances. The oil removal liability provisions remained unchanged.

The FWPCA amendments of 1977⁸³ modified several clauses of Section 311 pertaining to liability. The most noticeable change is the increased limits of liability for Government removal costs which now included the costs of ". . . restoration or replacement of natural resources damaged or destroyed as a result of a (prohibited) discharge of oil or a hazardous substance. . . "((f)(4)). The limits for facilities were raised from \$8 million to \$50 million ((f)(2) and (3)) as the limits served no useful purpose, and they were ". . . inadvertently subsidizing large tankers and thus enhancing their competitive position over smaller vessels."⁸⁴ Vessel limitations were changed to \$150 per gross ton with those vessels carrying a polluting cargo having a minimum liability of \$250,000. Inland oil barges became liable for \$125 per gross ton with a minimum liability of \$125,000.

One interesting change modified the third party exception by making the polluter who alleges this defense still liable to the United States for removal costs, but it also entitles him by subrogation to all rights of the United States to recover such costs from the third party ((g)).

The most recent amendment of Section 311 was in 1978;⁸⁵ however the removal liability provisions remained unchanged.

Professors Gilmore and Black, in their treatise on The Law of Admiralty, describe the Act as being ". . . as soft and spineless in its drafting as it is muddle-

⁸³Clean Water Act, Statutes at Large 91, 1566 (1977), U.S. Code Annotated, vol. 33, sec. 1321 (1978).

⁸⁴U.S., Congress, Senate, Clean Water Act of 1977, S. Rept. 370 to Accompany S.1952, 95th Cong. 1st sess., 1977, p. 64.

⁸⁵Federal Water Pollution Control Act, Statutes at Large 92, 2467 (1978), U.S. Code annotated, vol. 33, sec. 1321 (1979).

headed in its policy."⁸⁶ They were primarily perturbed by the ambiguity in the law as to whether the WQIA established the limits of liability even in the event that the characteristics of a particular incident were such that higher liability limits were available under the 1851 Limitation of Liability Act. We will see later that the courts appear to be holding that the WQIA as amended is the United States' only recourse for removal cost recovery. But, there really is little wonder that a law whose development was influenced and compromised by strong disparate factions would be labeled as "soft and spineless". After all, insofar as removal is concerned, the law's principal mandate is to expeditiously effect removal. This objective has wide public appeal, it drew little opposition, and it is successfully accomplished. However, what may be called the second objective of "not performing removal at the cost of the public treasury" opened a pandora's box of opposition from those to whom the law would be detrimental. Increasing the liability of a politically influential industry triggered the implementation of what economist Charles Schultze calls the "do no direct harm" rule. He claims that:

. . . the legislative process² is structured to increase the difficulty of passing legislation in proportion to the size of the harm it may do to a particular group.⁸⁷

We have seen that the marine industry saw the potential for considerable harm from the WQIA and the strength of the law was weakened appropriately, as will be discussed in the next section.

Legal Incentives and Disincentives to Incur Removal Costs

The effectiveness of the law as a tool for compelling the polluter to bear the cost of removal is found in its application. Perhaps the adversary forum

⁸⁶G. Gilmore and C. L. Black, The Law of Admiralty (Mineola, N.Y.: Foundation Press, 1975), p. 827.

⁸⁷C. L. Schultze, The Public Use of the Private Interest (Washington, D.C.: The Brookings Institution, 1977), p. 23.

provided by the courts provides the most strenuous test of the law by interpreting it in the context of other law and by smoothing legal ambiguities. Through this judicial application of the law it has been said that ". . . the law is a living thing that must keep (pace) with the people and conditions it regulates."⁸⁸ This section will look at the application of this law, particularly the legal incentives and disincentives to bear the cost of removal.

The majority of the interviewed attorneys were of the opinion that the present form of the law is of good quality. The law is generally worded well; the burden of proving exceptions to liability is on the polluter; the law is workable; and the law does accomplish its main purpose—the prevention and mitigation of pollution discharges. But, on the other hand, most of the interviewees did not feel that the results of the law measured up to the "spirit of the law" with respect to the polluter accepting responsibility for discharge removal. These perceptions of the law are not wholly incongruent because the interviewees attributed many of the program's problems to its administration. However, most of the interviewees did admit that the law offered few incentives, and many disincentives, for the polluter to readily incur removal costs. In fact, several of the attorneys, especially those who did or had worked at the higher administrative levels of Coast Guard Headquarters and in the Justice Department, were of the opinion that the law offered no incentive for the polluter to voluntarily undertake removal.

Legal incentives and disincentives are not a dry restatement of the law as discussed in the previous section. On the contrary, this subject is part of the dynamic decision making process that each knowledgeable polluter faces. It is the polluter weighing the benefits and costs of alternative methods of responding to a

⁸⁸Wells v. Kansas City Life Ins. Co., 46 F. Supp. 754, 758 (D.N.D., 1943), aff'd 133 F. 2d 244 (8th Cir. 1943).

pollution incident, or to a government billing for removal costs, or both. To aid the reader in forming a frame of reference for an analysis of this topic, I will relate some of the initial events of the M/V (Motor Vessel) Zoe Colocotroni casualty as described in a United States District Court decision.⁸⁹

The Zoe Colocotroni is a 605-foot long tankship of 15,899 gross tons.⁹⁰ The twenty-year-old vessel was registered in Panama and homeported in Piraeus, Greece. On March 15, 1973, the Zoe Colocotroni took on a load of 187,670 barrels of crude oil in Venezuela. The crude was being shipped by Mobil Oil Company to a refinery in Puerto Rico. In the early morning hours of March 19, negligent navigating caused the vessel to go aground. The master attempted to free the vessel by pumping overboard a large quantity of oil which went ashore at beaches and mangrove swamps on the southwest coast of Puerto Rico.

At the incipient stages of response to the pollution, the Coast Guard repeatedly attempted to identify and contact the responsible party.⁹¹ On March 19, at 0805, a Mobil representative informed the Coast Guard that he expected Mobil to take responsibility but he had not received confirmation from the head office in New York. About an hour and a half later, the representative said Mobil was trying to obtain permission from the vessel owner to clean up the oil at the owner's expense. At 1605, Mobil's New York office informed the Coast Guard that it would not accept responsibility for removal costs, but they were attempting to contact the vessel's P&I Club, the West of England Steamship Owners Protection and Indemnity Association, Ltd.

On March 20, the underwriters appointed Captain William Coleman as their

⁸⁹United States v. M/V Zoe Colocotroni, 456 F. Supp. 1327 (1978).

⁹⁰*Ibid.*, pp. 1332-33.

⁹¹*Ibid.*, p. 1345.

local representative. On March 21, Captain Coleman and the underwriter's New York representative informed the Coast Guard that the underwriters would assume all cleanup costs commencing from the initial response. It was agreed that the cleanup organization would continue unchanged and the underwriters would send people to handle the finances. The next meeting of the Coast Guard and underwriter representatives was on March 30. The underwriters were concerned that they were not sure of their legal responsibility if the limits of their policy liability under the FWPCA were exceeded. In view of this hesitancy, the Federal removal continued at a total cost of over \$650,000.

Uncertainty over liability limitations was a stated reason for not incurring removal costs. We do not know of the deliberations of the managers of the vessel, Mobil Oil Company, and the P&I Club; however, we can be sure that many other factors were considered. We can also justifiably be certain that today's polluters and their counsels have a more sophisticated and reliable decision making process. They now have the benefit of hindsight gained through many judicial decisions and more experience in working with the law.

Legal incentives to incur removal costs

Knowledge that removal is mandatory

Simply knowing that the President is authorized to remove or arrange for the removal of a discharge⁹² may serve as strong incentive for the polluter to incur the costs of removal. With knowledge that money will be spent for removal, the polluter's decision with respect to economic liability is largely a function of the comparative costs to the polluter of a private and a Government removal. And should there be a Government removal, the amount of that cost to actually be reimbursed by the polluter. Both the private and the Government removal are

⁹²U.S. Code, vol. 33, sec. 1321(c)(1).

performed to the same standard—to the satisfaction of the Federal On Scene Coordinator.⁹³

One obvious incentive to avoid a Government removal is that the polluter is liable for the actual costs of government removal including Government resources and personnel used in the removal.⁹⁴ There is a consensus among a certain segment of the population that the Government is wasteful with the taxpayer's money. This was certainly the viewpoint of one polluter who contended that the charges for cleaning an oil sheen were excessive and represented overkill on the part of the Government. The bill was \$763.50 to clean up a 10-15 gallon discharge from the Ohio River in 1972. In this case, the court was inclined to agree with the unreasonableness of the charge; however, the court said that the Government was entitled to recover the actual expenses incurred in cleaning up oil, even if those expenses are not reasonable.⁹⁵

The extent to which mandatory removal provides incentive to directly incur removal costs is unique to each polluter's decision making process. A shipyard or petroleum terminal may have the personnel and equipment on hand to quickly perform a low cost cleanup. A non-marine facility, such as a school whose fuel oil tank overflowed, would probably resort to a Government cleanup for lack of familiarity with other options. On the other hand, a barge operator who is very savvy and experienced in dealing with pollution problems may refuse to accept responsibility with the intent that the long-term settlement will be the most cost effective remedy for the barge company or his insurer. Although it is uncertain what effect mandatory removal has on the incentive of the polluter, it does force

⁹³Ibid., sec. 1321(e)(1).

⁹⁴Ibid., sec. 1321(F)(1).

⁹⁵United States v. Beatty, Inc., 401 F. Supp. 1040 (D.C. Ky. 1975).

a decision and foreclose the option of zero removal costs, which could occur if an ambivalent polluter could delay his response until the pollutant dispersed and removal was no longer feasible.

Avoid lawsuits and other inconveniences

Nobody likes to be sued. This generality is probably more true for the uninsured small business and fisherman than it is for the large barge operator who regularly retains legal services, or the corporation with a legal department.

When a vessel is suspected of discharging a pollutant, the owner/operator may be faced with costly delays and inconveniences accompanying the investigation of the incident as well as actions taken by the United States to recover cleanup costs. For example, the availability of penalty costs (generally \$5,000 maximum) is assured when the Coast Guard requests U.S. Customs to withhold the vessel's clearance to leave port until a bond or other surety is filed.⁹⁶ Generally, no similar guarantee is sought for removal costs until long after the cleanup is completed when a lien may be placed on the vessel in the course of litigation. This statutory lien permitted by the FWPCA⁹⁷ is limited to the vessel's limitation of liability.⁹⁸ One attorney noted that the maritime lien generally presents a problem only for the small vessel operator who may not be able to post bond. Should this happen, the Coast Guard is usually reluctant to seize the vessel because of the burden of maintaining it pending litigation.

No matter what the source of the discharge, the dilatory polluter faces a series of demand letters seeking collection of Government removal costs under threat of further legal action. But again, while these letters may compel payment

⁹⁶U.S. Code, vol. 33, sec. 1321(b)(6).

⁹⁷Ibid., sec. 1321(F)(1).

⁹⁸United States v. M/V Big Sam, 454 F. Supp. 1144 (D.C. La. 1978).

from the small businessman who cannot afford to stand up to the Government, many of the interviewees noted that the letters only cause further delay and perhaps repress the probability of recovery from the polluter who intends to resist collection efforts.

Miscellaneous incentives

With the exception of the "avoiding the cost of government removal" incentive, the interviewed attorneys were hard pressed to think of legal incentives for the polluter to incur removal costs. One interviewee noted that cleanup was a tax deductible business expense, but of course this expense also cuts into profits and is therefore best avoided if possible. Another noted that the polluter's removal actions could mitigate the penalty. This may be the case in very small discharges, but it does not take much of a spill cleanup to offset any possible mitigation of a maximum \$5,000 penalty which is usually far less. It is understandable that the hearing officer who assesses the penalty would consider the removal efforts of the polluter although this assessment criteria is not permitted by the law⁹⁹ and is contrary to Coast Guard policy.¹⁰⁰ Perhaps this situation shows an individual interpretation of common sense or justice in the face of a law that otherwise offers little incentive for the polluter to perform removal on his own initiative.

It is also said that early response by the polluter will probably mitigate the total amount of damages for which the polluter may be held liable. This frequently may be the case for spills occurring where the polluter has the removal resources immediately at hand, such as at a marine terminal during normal

⁹⁹U.S. Code, vol. 33, sec. 1321(b)(6).

¹⁰⁰G. S. Voyick, "Problems with Civil Penalty Assessment Federal Water Pollution Control Act of 1972, as Amended," M.S. thesis, University of Michigan, 1977.

working hours. However, in the case of marine casualties, or spills discovered by someone other than the polluter, it is likely that the Federal response would be just as rapid as the polluter's response.

Legal disincentives to incur removal costs

The interviewees readily noted that some aspects of the law were disincentives to the polluter performing removal or readily reimbursing Federal collection costs.

Exceptions to liability

The most conspicuous disincentives to incurring removal costs occur where the law expressly absolves the owner or operator of liability when he ". . . can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party. . . or any combination of the foregoing clauses. . . ". Most of the interviewees took the philosophical view that the burden of proving these defenses was on the polluter, and if he could overcome this difficult threshold in court, that was acceptable and the intent of the law was being carried out.

On their face, the exceptions seem easily justifiable. After all why hold the owner or operator liable for the removal costs caused by the wrath of a hurricane, sabotage, or a misplaced buoy? Certainly it is equitable to hold liable the third party causing the discharge rather than the owner or operator of the pollution source. In all of these exceptions there is no fault by the discharger. Nor is there any fault when a ship's skin is pierced by an uncharted submerged object, yet it is held liable under the strict liability of the law. Fault is not the issue; rather, the exceptions to liability represent a concession to maritime interests who abhorred the thought of absolute liability.

One author, attorney A. I. Mendelsohn, noted that the exceptions would inevitably stimulate unnecessary litigation as well as delay and probably depress

most recoveries.¹⁰¹ Mr. Mendelson was referring to the first three exceptions as they were set forth in a 1969 bill on oil pollution liability. He was particularly concerned that the first two exceptions, act of God and act of war, were not consistent with the modern tort law concept of determining liability based on risk distribution rather than fault or blame. In other words, the polluter is best able to incur and distribute the losses.¹⁰² Nevertheless, Congress permitted these exceptions.

Unfortunately, it is difficult to determine the impact of the exceptions as there is no official categorizing of incidents that explicitly states whether an exception to liability is applicable. My years of experience with the program, discussions with the interviewers, and review of available program data that do not directly address the subject, indicate that only the "third party" exception is used with any regularity. I know of no incidents where the "act of war" exception was applicable. It is a rare occasion when the discharge is the result of "negligence on the part of the United States", although there is potential for this defense to be raised whenever the United States responds to an incident. One ultimately unsuccessful use of this defense occurred when the owners of M/V Tamano argued that the United States was solely liable for a grounding and the resultant oil spill because of a misplaced buoy.¹⁰³

In an attempt to gain a conception of the prevalence of incidents where an exception applied, I reviewed a list, with descriptive comments of twenty pre-1967 pollution fund incidents where Federal removal cost exceeded \$100,000.¹⁰⁴

¹⁰¹Mendelsohn, Marine Liability, pp. 23-24.

¹⁰²*Ibid.*, p. 14.

¹⁰³Burgess v. M/V Tamano, 564 F. 2d 964 (1st Cir. 1977).

¹⁰⁴U.S. Coast Guard, "Pollution Fund Incidents Greater Than \$100,000," 1976. (Typewritten).

The circumstances of each incident may be grouped as follows:

Structural failure of tank	1] 11 probably no defense
Fire/Explosion	3	
Overflow or intentional discharge	3	
Unknown	1	
Grounding of self-propelled vessel	3] 7 potential third party
Alleged vandalism	1	
Grounding of barge under tow	3	
Collision	3] 2 act of God
Flood waters eroding dikes	2	

A cursory overview of these cases shows that the discharger may be likely to apply an exception in half of them. Admittedly, a good attorney would strive to find an arguable defense to all of these incidents. What is interesting is the number of incidents where the polluter may argue that a third party opened the valve, towed the barge aground, or caused the collision. Indeed, the Justice Department has claimed that the greatest limit on speedy recovery of cleanup costs was the joining of cleanup liability suits with third party negligence actions.¹⁰⁵ This gave rise to the 1977 amendment modifying the third party exception by making the polluter who alleges this defense still liable to the United States for removal costs, but entitled by subrogation to the rights of the United States to recover such costs from the third party. Ironically, this type of case has not come up in the unit of the Justice Department that litigates admiralty cases since the 1977 amendments were enacted.¹⁰⁶ Of course, where a third party is liable, action may still be taken to recover removal costs although the third party

¹⁰⁵U.S., Congress, Senate, S. Rept. 307, p. 65.

¹⁰⁶Interview with Allan Van Emmerick, Ast. Director, Torts Branch, Civil Division, Justice Department, Washington, DC, 6 May 1980.

may have less liability or be less solvent than the discharger. In the above cases only the "act of God" exception, which in all likelihood applies to the two flooding incidents, serves to foreclose further efforts of the Government to recover costs. Therefore, the exceptions do not appear to significantly dilute the strength of the law. In chapter three, however, we will see that the exceptions are an important factor in delaying and depressing recoveries as predicted by Mendelsohn.

Limitations of liability

There are basically two ways that the limitation of liability provisions of the law serve as a disincentive to a polluter accepting responsibility for removal costs.

First, the limitation provisions obviously limit the liability of the polluter for Federal removal costs. These provisions also preempt recovery of removal costs under other law. Government attempts to "break" these limitations have failed thus far.¹⁰⁷

One case where the Government tried to "break" the limits involved a 1,265,000 gallon discharge into the Mississippi river in 1974 from a tank barge under tow by the M/V Dixie Buccaneer. The owner commenced cleanup and stopped when the cost reached what he contended to be the vessel's maximum liability under Federal law. The Coast Guard then took control of the cleanup and spent about \$1 million. The Government sought recovery under the Federal common law of public nuisance as well as the Refuse Act. The court's decision noted that the limitations of liability as first set out in the WQIA were the product of considerable Congressional debate and effort, and represented a deliberate compromise between extremes of limitation amounts and standards of

¹⁰⁷Interview with LCDR Thomas Snook, U.S. Coast Guard attorney attached to Justice Department, Washington, DC, 6 May 1980.

liability.¹⁰⁸ The compromise limited full liability to cases where willful negligence or misconduct could be shown. The court noted that this "... compromise would be destroyed if full liability were available under lesser standards or as part of another legal theory."¹⁰⁹

In another case the court wrote:

... By enacting the FWPCA, Congress comprehensively established standards and limits of liability for oil spill cleanup costs. The Government will not be permitted to present a claim for such costs under general maritime law, common law, or other statutes.¹¹⁰

Thus, the extent of a polluter's liability is certain and there is no legal incentive to incur removal costs beyond those limits.

Second, the limitation provisions act as a strong disincentive for the polluter to even commence a removal operation if there is a chance that the limitation will be approached. This fact was learned much to the chagrin of many operators who had initiated cleanup (such as the owners of the Dixie Buccaneer). Apparently, many polluters were under the mistaken impression that their cleanup expenses could be applied toward their liability for Federal removal; in other words, they believe that the total of the polluter's expenditure and his liability to the Government would not exceed his statutory limit of liability. This issue was clarified for members of the Coast Guard when it sought removal reimbursement from the owners of the Dixie Buccaneer. A 1974 Coast Guard Law Bulletin noted that excerpts of the law¹¹¹ and the pertinent legislative history made it "...

¹⁰⁸United States v. Dixie Carriers, Inc., 14 ERC 1163, 11 April 1980, (E.D. La. 1978), p. 1164.

¹⁰⁹*Ibid.*

¹¹⁰Complaint of Steuart Transportation Co., 435 F. Supp. 798 (D.C. Va. 1977), p. 808.

¹¹¹U.S. Code, vol. 33, sec. 1321(F) and (i)(1).

clear that the absence of a specific set-off provision is to be taken as a lack of Congressional desire that there be such a set off."¹¹² Thus the cost of cleanup removal for the polluter who responsibly initiates removal action is the sum of his expenditure and the cost of any Government removal up to the limitation. In late 1976, the American Waterways Operators, a trade association representing inland vessel operators, warned its membership that efforts by the Federal government to encourage the responsible party to initiate and fund a removal, while failing to inform him of his liability, ". . . can only be considered as some form of entrapment, or at the least, an exercise in Catch 22."¹¹³

Of course, irrespective of any statutory limitations, a polluter's liability may be further limited if he simply does not have the money. This should not be a problem in the case of vessels over 300 gross tons. These vessels must carry evidence of financial responsibility up to their statutory limitations in order to operate.¹¹⁴ But smaller vessels that may cause a significant discharge either directly, or indirectly as a third party, are not required to show financial responsibility. The same is true for most facility owners who need not be concerned about their statutory limitations of \$50 million since any action to recover removal costs from a corporate owner is ordinarily limited to corporate assets.¹¹⁵ As will be further discussed in chapter three, the insolvent polluter

¹¹²U.S. Coast Guard, "Law Bulletin No. 410," 17 October 1974.

¹¹³H. D. Muth, American Waterways Operators, Inc., Director of Government Relations, "Memorandum on double charges for oil or hazardous substance cleanups to AWO designated representatives," Arlington, VA, 9 December 1976.

¹¹⁴U.S. Code, vol. 33, sec. 1321(p)(1).

¹¹⁵Alcantara, p. 277.

need not even be in the legal process of bankruptcy¹¹⁶ in order to permit a claim for removal costs to be compromised based on his being unable to pay.

Government collection costs
not reimbursable

The cost of a Federal removal extends well beyond the actual costs of removal for which the polluter may be held liable.¹¹⁷ Many of these extra costs could be reduced or eliminated if the polluter had performed the removal or readily reimbursed the Federal removal. Yet there is no credit for the polluter who will decrease the non removal costs of a Federal cleanup by accepting responsibility for removal. The full extent of these Government overhead or transaction costs can only be quantified through much additional study because they are blended into other larger budgetary categories. The general purposes of these overhead costs are to support the removal effort, to account for expenditures, and to collect Federal claims for the removal. The personnel include contracting officers, auditors, accountants, lawyers, and other administrative support people; there are also other personnel who must attempt to perform the normal functions of those working the removal. Some of these support functions will be further described in chapter three.

A Federal statute expressly prevents recovery of attorney's fees as follows:

Except as otherwise specifically provided by statute, a judgement for (court) costs. . . but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States. . .¹¹⁸

Government attorneys attempted to sidestep this statute in the United States v.

¹¹⁶The legal process of liquidation of the debtors assets and paying creditors is controlled by the Bankruptcy Act, U.S. Code, vol. 11, sec. 1 et seq.

¹¹⁷U.S. Code, vol. 33, sec. 1321(F).

¹¹⁸Act of July 18, 1966, Statutes at Large 80, 308 (1966), U.S. Code Annotated, vol. 28, sec. 2413 (1978).

M/V Zoe Colocotroni by using a Puerto Rico rule that allowed recovery of attorney's fees.¹¹⁹ The court stated that the purpose of the statute was to place private litigants on an equal footing with respect to litigation costs and the court ruled that the right to recover costs was a matter of Federal and not state law; and Federal law prohibited such recovery.

Prejudgement interest

The rules by which interest may be added to amounts owed to the Government serve as further disincentive to the polluter to readily incur removal costs. Although the statute makes no mention of interest, the courts have fashioned rules for granting or denying interest on such statutory obligations. The basic criterion is that a party that has suffered money damages by another's breach of obligation should be fairly compensated for the losses sustained, including interest.¹²⁰

Most of the interviewees were of the opinion that the interest collected on monies owed the Government were insufficient. This inadequacy stems from the use of a rate of interest which is typically well below the market rate, and also from the short time span upon which it is granted. The M/V Zoe Colocotroni is again a case in point. The discharge occurred and the cleanup commenced on March 18, 1973. The United States requested prejudgement interest at 8 percent from the dates the contractors were paid, July 19, 1973, and November 4, 1974, up until early 1978.¹²¹ The court reminded the parties that the granting of prejudgement interest lies within the discretion of the court. The court, while mindful of the general rule in admiralty that interest is awarded from the date of

¹¹⁹United States v. M/V Zoe Colocotroni, pp. 1350-51.

¹²⁰Rogers v. United States, 332 U.S. 371 (1947), p. 373.

¹²¹United States v. M/V Zoe Colocotroni, p. 1346.

the casualty, awarded interest from November 4, 1974, because prior to that time the Government claims were unliquidated, hence not fully known. The rate was limited to 6 percent and under no circumstances could it exceed the rate allowed by the state in which the court sits. As gathered from the interviews, 6 percent appears to be the traditional rate used by most courts. The difference between this figure and the market rates of recent years certainly serves to encourage the polluter to delay payment, especially if interest rates exceed attorney fees.

Statute of limitations

In 1979 there was a judicial decision that absolved a polluter from removal liability for a particularly disturbing reason. Many of the interviewees indicated that there had been uncertainty as to whether the applicable statute of limitations for FWPCA recoveries was three or six years. In a decision rendered in May 1979, the U.S. District Court in Maryland opted for three years.¹²² On August 10, 1979, the tank barge Shamrock was taking on fuel oil at the Shell Oil Company terminal at Baltimore. As the tankerman slept, over 3,000 barrels (42 gallons per barrel) spilled. Just over three years later, in September 1978, the United States filed action to recover in excess of \$460,000 in Federal cleanup costs. The court ruled that the recovery action was subject to the limitations of 28 U.S.C. Section 2415, which provides that every action for money damages brought by the United States "which is founded upon a tort" is barred unless filed within three years after the right of action accrues.

The above case is sobering because long delays of processing collection actions are inherent in the administrative system as will be shown in chapter three. Government attorneys have tried to buy time by arguing that the time span for the statute of limitations runs from the date the contractor is paid, rather

¹²²United States v. The Barge Shamrock, ___, ___ F. 2d ___ (D. Md. no. B-78-1661, decided 11 May 1979).

than the date of casualty, until the date that suit is filed.¹²³ This tactic did not work with the Maryland Court and it remains to be seen what will happen with some upcoming similar cases such as a \$500,000 Cleveland case that was recently filed in a U.S. District Court over three years after the incident occurred.¹²⁴

¹²³Interview with Snook.

¹²⁴Ibid.

III

ADMINISTRATIVE EFFORTS TO RECOVER FEDERAL REMOVAL COSTS FROM THE POLLUTER

Pollution Response and the "Federal Spill"

Nowhere does the FWPCA mandate the polluter to clean up a discharge. As has been discussed, the FWPCA simply makes the polluter liable for Government removal costs.¹ The statutory requirement for affirmative response by the Government reads:

. . . the President is authorized to act to remove or arrange for the removal of such oil or (hazardous) substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.²

Similarly, there is no regulation requiring the polluter to commence removal although one author³ suggests that arguable authority for doing so exists where the FWPCA authorized regulations establishing removal methods and procedures.⁴ Nevertheless, agencies generally have not attempted to require a polluter to remove his discharge from the water.⁵

The Government organization and response to pollution incidents is outlined

¹U.S. Code Annotated 33, sec. 1321(f), (1979).

²Ibid., sec. 1321(c)(1).

³Leonard F. Alcantara, "Laws and Regulations with Respect to Containing and Cleaning Up Oil Spills," Paper presented at the American Law Institute—American Bar Association Course of Study, Miami, Fla., 17 and 18 April 1980, pp. 226-67.

⁴U.S.C.A. 33, sec.(j)(1)(A) and (C).

⁵Alcantara, pp. 226-67.

by the National Oil and Hazardous Substances Pollution Contingency Plan⁶ which was promulgated under the authority of the FWPCA.⁷ The Plan places the authority for the direct coordination and supervision of Government response on the shoulders of the Federal On Scene Coordinator (OSC). The Environmental Protection Agency (EPA) is responsible for providing the OSC to manage Federal Response in inland waters, while the U.S. Coast Guard provides the OSC for coastal water discharges. The Plan also organizes a complete array of Federal and state agencies that may be drawn upon to aid a response effort. The full extent of this organization and the many response guidelines offered by the Plan are not germane to this paper and will not be further addressed.

Until recently, if one searched the latter half of the Plan thoroughly enough, one could find very strong wording stating that the polluter was to be encouraged to perform the removal. The first paragraph under the annex entitled "FUNDING" was as follows:

The primary thrust of this Plan is to encourage the person responsible for a discharge to take appropriate remedial action promptly. Usually this will mean that the cost of removal of the discharge shall be borne by the person responsible for the discharge. The OSC and other officials associated with the handling of pollution emergency shall make a substantial effort to have the discharger voluntarily accept this responsibility.⁸ (emphasis added)

With considerably less flourish the Coast Guard echoed this policy by saying, "Consistent with (law, regulation, and policy), it is common practice to encourage the party responsible for a discharge to take appropriate actions to remove the

⁶National Oil and Hazardous Pollution Contingency Plan, Federal Register 45, 178326 (19 March 1980).

⁷U.S.C.A 33, sec.(c)(2).

⁸National Oil and Hazardous Substances Pollution Contingency Plan, Code of Federal Regulations 40, pt. 1510, 1901.1 (1979).

discharge.⁹ Without explanation for the change, the 1980 revision of the National Contingency Plan no longer instructs Government officials to encourage the polluter to voluntarily perform the removal. Reference is only made to the OSC taking notice of the polluter's response and initiating Federal action if that response is inadequate.¹⁰ Hence, recent Federal policy seems to only passively encourage the polluter to clean up. I trust that OSC's still actively encourage the polluter to take the initiative if that is the means to the most efficient cleanup as is premised by this paper. For if the polluter does accept responsibility for the removal, and takes proper removal actions, the Government role need only be limited to the simple and relatively inexpensive task of monitoring the removal efforts and investigating the incident.¹¹

Figure 1 is a flow diagram depicting the steps of the initial Federal response to a pollution discharge. From the time of notification at point A until point B are the steps for ascertaining if the discharge violates Section 311 of the FWPCA. If the FWPCA is applicable, the OSC determines if removal is feasible. If removal is feasible and the polluter performs the removal, the procedure follows the steps on the heavy line from point B to point C. The OSC simply monitors the removal until completion at point C.

If the polluter is unknown or does not take proper removal actions, we move to step D in figure 1 where the OSC actively initiates and coordinates pollution removal—a situation colloquially known as a "Federal spill".

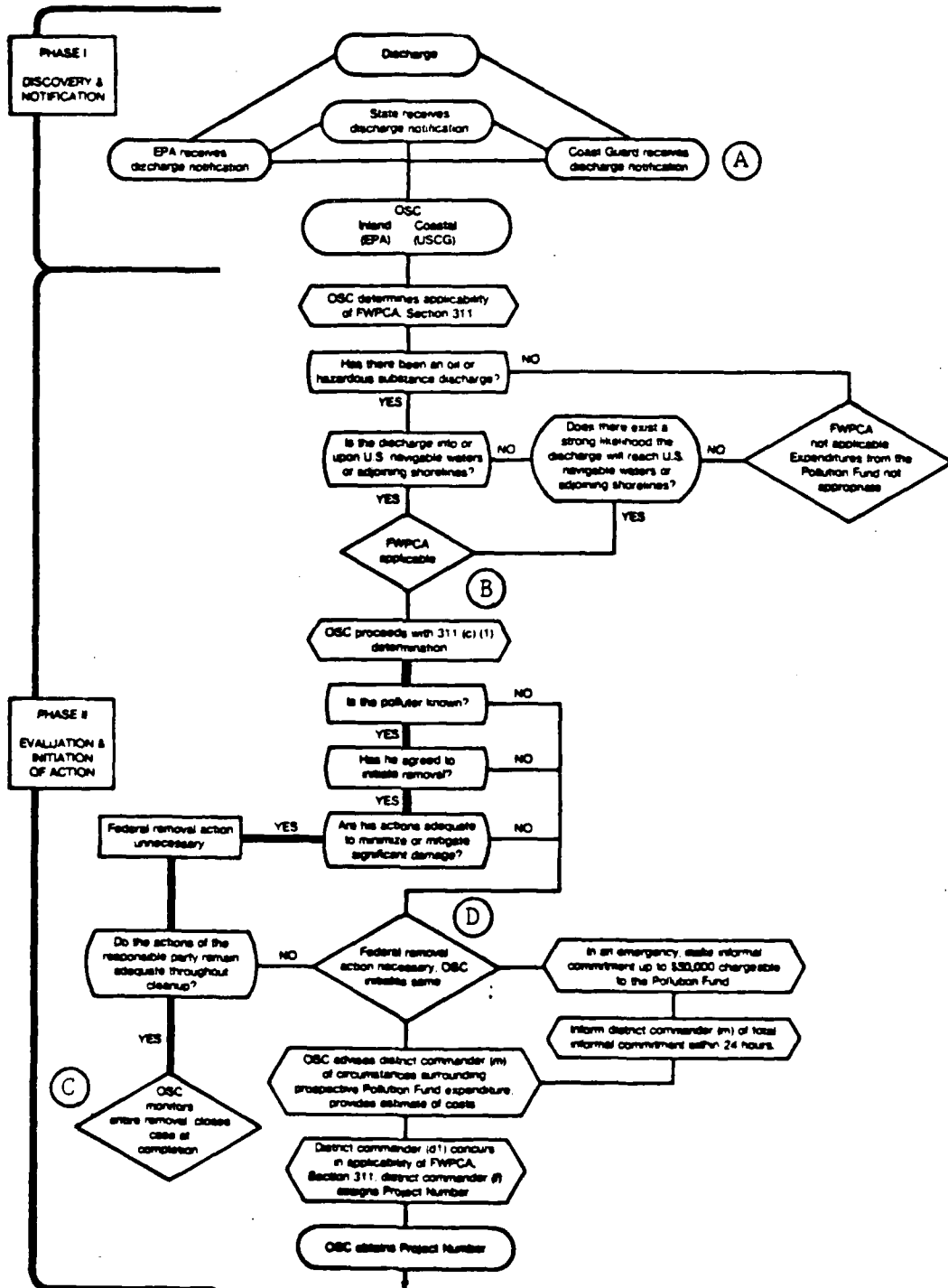
A Federal spill requires activation of the revolving pollution fund that was

⁹U.S. Coast Guard, Marine Safety Manual (CG-495), Revised 1980, D 86-3-40G.

¹⁰Nat. Oil and Haz. Plan, (1980), pt. 1510.65.

¹¹Ibid., pt. 1510.63.

Fig. 1. Pollution response flow diagram



SOURCE: U.S. Coast Guard, Marine Safety Manual (CG-495), Revised 1980, Plate 86-3-40G.1.

established pursuant to Section 311(k) of the FWPCA¹² and is administered by the Coast Guard.¹³ Generally this fund pays for those Government removal expenses that are both authorized by the OSC and are not considered normal agency operations funded through ordinary appropriations.¹⁴ Figure 2 is a simplified illustration of the source of funds for various parts of a Federal spill, and the costs for which the polluter may be liable. In general, the pollution fund finances the following: cleanup contractors; travel and per diem; incremental operating costs for ships, planes, vehicles and other equipment; resources expended in the removal; and damage claims stemming from the removal.¹⁵ The pollution fund does not pay the salaries of those Coast Guard personnel and personnel from other agencies who are normally obligated to perform spill response duties. Within the limits of the FWPCA, the polluter is liable to the pollution fund or agency's operating appropriations.¹⁶ The polluter is not liable for administrative overhead costs not directly associated with the removal operation. The fact that the polluter is often liable for removal costs coming from two different fund sources is an important point to keep in mind for a later discussion of the compromising of claims.

Figure 3 continues the Federal spill response steps from the end of figure 1 flow diagram. During Phase III and IV the removal is being performed and the actual costs of removal are being documented. In Phase V the OSC compiles and

¹²U.S.C.A. 33, sec. 1321(k).

¹³Assignment of Presidential Functions, Federal Register 38, 21243
(3 August 1973), Ex. Order No. 11735.

¹⁴Code of Federal Regulations 33, pt. 153 (1979).

¹⁵U.S. Coast Guard., D 86-3-45C.

¹⁶C.F.R. 33, pt. 153.405.

Fig. 2. Federal spill funding and the liability of the polluter

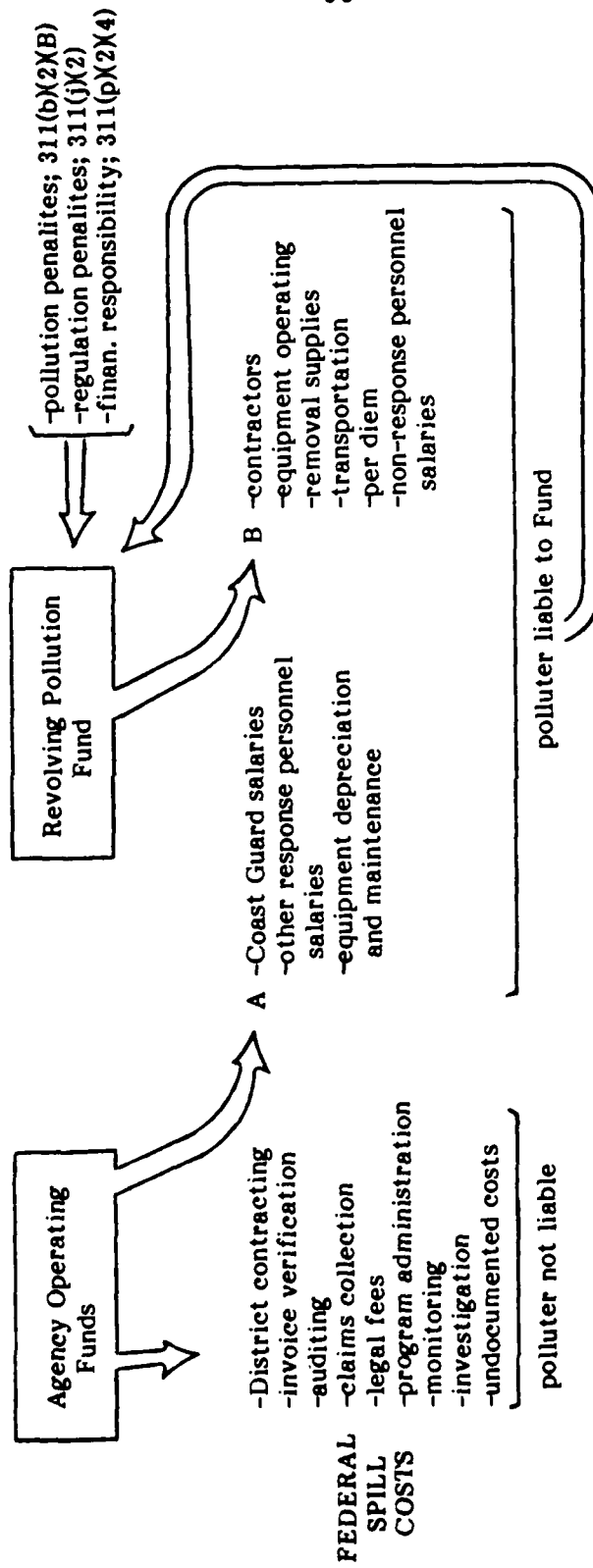
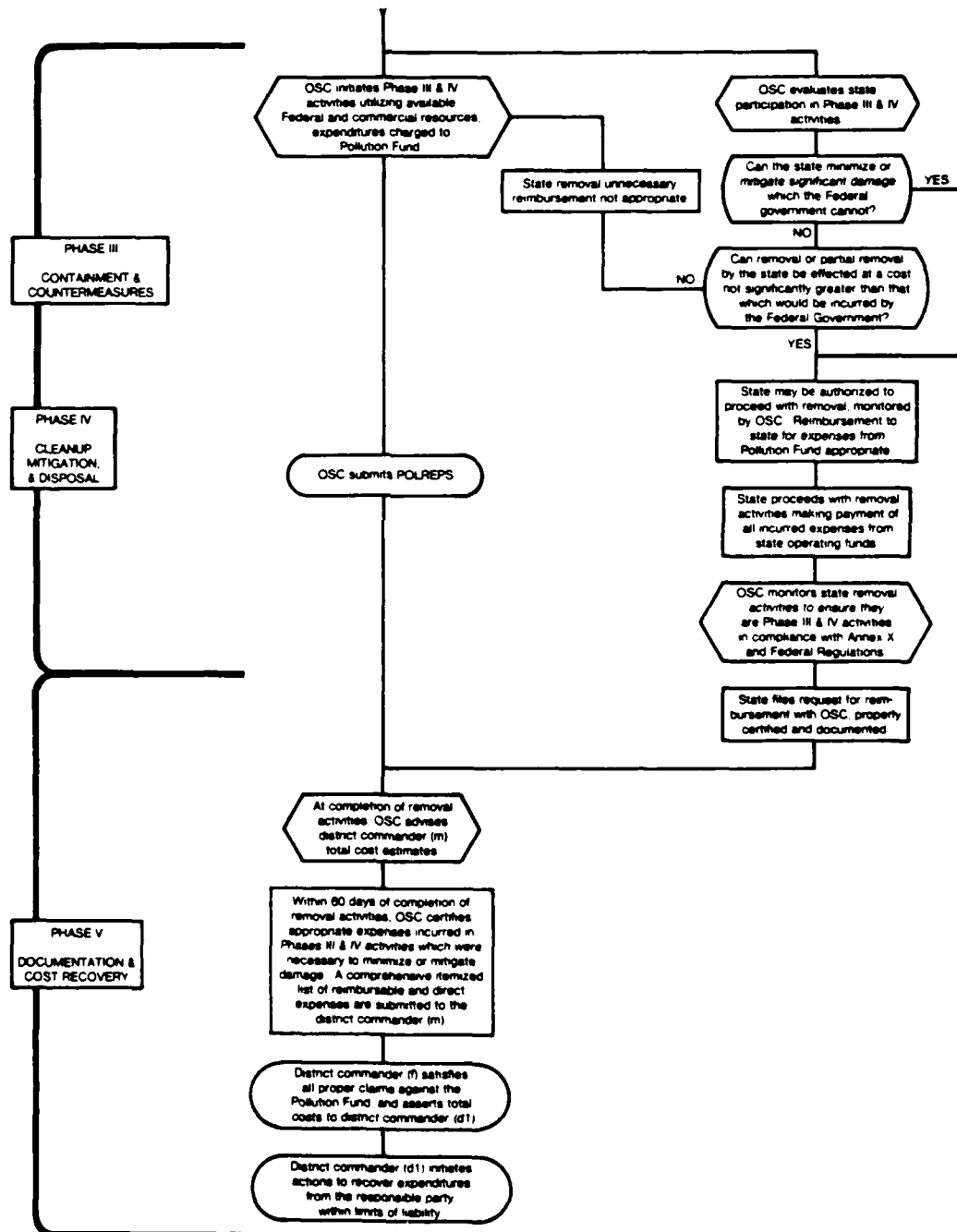


Fig. 3. Pollution response flow diagram (continued)



SOURCE: U.S. Coast Guard, Marine Safety Manual (CG-495), Revised 1980, Plate 86-3-40G.2.

forwards the removal documentation to higher administrative levels for the payment of removal costs and the recovery of those costs from the polluter.

Federal Spill Cost Recovery

Organization

It was previously noted that, barring any defenses, a Federal removal creates a liability for the polluter to the pollution fund. As one might expect, the Coast Guard also controls the administrative mechanism for collecting that liability.

The pollution fund is administered through the Coast Guard's hierarchal organizational structure involving a headquarters, district offices, and OSC's at the field level who are from either the Coast Guard or the EPA. Both the responsibility for asserting claims against the polluter and most of the procedural steps that may be required to pursue that claim lie at the district level; this level will be emphasized throughout the remainder of the chapter.

The United States, U.S. Territories, and adjacent waters are divided into twelve districts. The district is the regional management area of the Coast Guard and as such, the district commander is responsible for managing Coast Guard programs within each district. To better manage these various programs each district office is further subdivided into divisions or offices representing major program areas and support functions.

The Federal spill collection process typically involves the following district level program and support divisions and branches with their corresponding staff symbols:

- marine safety division (m)
 - marine environmental protection branch (mep)
- comptroller (f)
 - contracting branch (fcp)
 - accounting branch (fac)
- legal (dl)

At the headquarters level of the Coast Guard, the only unit that is a frequent participant in the collection process is the Claims and Litigation Division (G-LCL).

When the Coast Guard's administrative collection process fails, the cases are referred to the Justice Department for litigation or whatever action it deems appropriate.

Procedure

Law and regulations impose few specific guidelines on the collection procedures adopted by each district. The FWPCA simply identifies the party who is liable for removal costs¹⁷ and places the authority to delegate administrative duties with the President.¹⁸ The regulations for administration of the pollution fund do not describe collection procedures.¹⁹ The Coast Guard's Marine Safety Manual²⁰ details operational response to spills and describes how the pollution fund should be used, but it offers no guidance on administrative cost recovery. A Coast Guard Commandant's Instruction does outline procedures for documenting an incident—a critical preliminary step to cost recovery efforts.²¹ In the course of interviewing the attorneys and several finance officers the only formal procedural guidance for collection came from three sources: Annex P of the Coast Guard Comptroller Manual²² deals generally with the administration of the pollution fund; and there are two sets of regulations promulgated under the

¹⁷U.S.C.A. 33, sec. 1321(f)(9) and (p)(3).

¹⁸Ibid., sec. 1321(c).

¹⁹C.F.R. 33, pt. 153.

²⁰U.S. Coast Guard, D 86-3.

²¹U.S. Coast Guard, Commandant Instruction 16450.1, 13 April 1978.

²²U.S. Coast Guard, Comptroller Manual, Chapter P, 1972.

authority of the Federal Claims Collection Act²³ dealing with the general Federal collection standards²⁴ and the delegation of claim settlement authority within the Coast Guard.²⁵ For the most part, any additional direction is informally disseminated in the form of memoranda, telephone conversations, legal officer conferences, etc.

Comptroller Manual

Annex P of the Comptroller Manual dates from 1972 and is currently being updated.²⁶ It deals primarily with the accounting aspects of managing the pollution fund.

Insofar as cost recovery is concerned, Annex P directs the OSC to submit a list of the groups authorized to participate in the cleanup, and estimated costs for each group, to the district comptroller as soon as is practicable. It further directs Federal agencies to submit to the district commander, within 60 days after the completion of the removal, an itemized list of the actual costs recoverable against the polluter,²⁷ Other regulations require that this list be forwarded via the OSC for review and certification.²⁸ Annex P places responsibility for asserting a claim for the actual cost of removal on the district comptroller.²⁹

²³Federal Claims Collection Act, Statutes at Large 80, 308 (1966), U.S. Code, vol. 31, sec. 951 et seq. (1976).

²⁴Federal Claims Collection Standards, Code of Federal Regulations 4, pt. 101 et seq. (1980). Some of these standards are interpreted or emphasized by the outdated U.S. Coast Guard, Commandant Instruction 5892/5922, 9 April 1974.

²⁵Code of Federal Regulations 33, pt. 25.1601 (1979).

²⁶Interview (telephone) with Mr. Casey, Asst. Division Chief, U.S. Coast Guard (G-FAC), Washington, D.C. 6 June 1980.

²⁷U.S. Coast Guard, Comptroller Manual, pp. P-12-13.

²⁸C.F.R. 33, pt. 153.417(a).

²⁹U.S. Coast Guard, Comptroller Manual, p. P-13.

Federal Claims Collection Standards

These regulations³⁰ prescribe standards for the administrative collection, compromise, termination of agency collection, and referral for litigation of civil claims by the Federal Government. The latter topics will be addressed later in the chapter. At this point, the pertinent administrative collection aspects will be discussed.

The standards call for the head of an agency or his designee to

. . . take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money . . . arising out of the activities of, or referred to, his agency in accordance with the standards in this chapter.³¹

A basic procedural step imposed by these standards is that of requiring the agency to make up to four written demands upon the debtor as follows:

1. Initial demand - informs the debtor of consequences of failure to pay, basis for indebtedness, policies about charging interest or reporting debt to commercial credit bureaus, and due date which is not normally more than 30 days from notification.
2. Three progressively stronger demands are made at not more than 30-day intervals unless a response to the first or second demand indicates further demand is futile and the debtor's response does not require rebuttal.³²

Note that four written demands, plus the time spent waiting for a response, should take no longer than four months. These procedures modify the pre-1979 requirement for three written demands at 30 day intervals—or at least three months total.³³ The fact that "30 days" is now the maximum—rather than the required minimum—waiting period for a response to a demand, offers one possibility for

³⁰C.F.R. 4, pt. 101.1.

³¹Ibid., pt. 102.1.

³²C.F.R. 4, pt. 102.2.

³³Ibid., pt. 102.2.

improvement of the collection procedure to be further amplified later. To supplement this written notification the regulations also require agencies to personally interview their debtors if it is feasible to do so.³⁴

Another procedural step added in the April 1979 revision is that debts could be referred to commercial credit bureaus.³⁵ The Coast Guard has not yet attempted this tactic, nor has it performed the regulation requirement of developing and implementing procedures for using credit bureaus.³⁶ Finally, this option has not been threatened in demand letters thus far. After hearing a number of negative responses to my questions about the use of collection bureaus, I finally learned from the last few interviewed attorneys that they did not have the up-to-date Code of Federal Regulations or the Federal Register with the new credit bureau provision and revised written demand letter guidelines published in April 1979. The procedures followed in other districts led me to believe that they also had not yet updated their procedures.

Most of the remaining standards are concerned with how to settle, compromise or refer a claim for litigation. Before discussing these direct dealings between the Government and the polluter, I will characterize the procedural steps of the typical district collection when the polluter chooses to ignore collection efforts.

Typical district collection procedure

I say "typical" collection procedure because the above guidelines do not by any means serve as a tight rein on the methods adopted by the districts. The latitude afforded to each district is considerable, as will become apparent to the

³⁴Ibid.

³⁵Ibid., pt. 102.4.

³⁶Interview (telephone) with LCDR M.C. Cain, Attorney, U.S. Coast Guard (G-LCL), Washington, D.C., 9 June 1980.

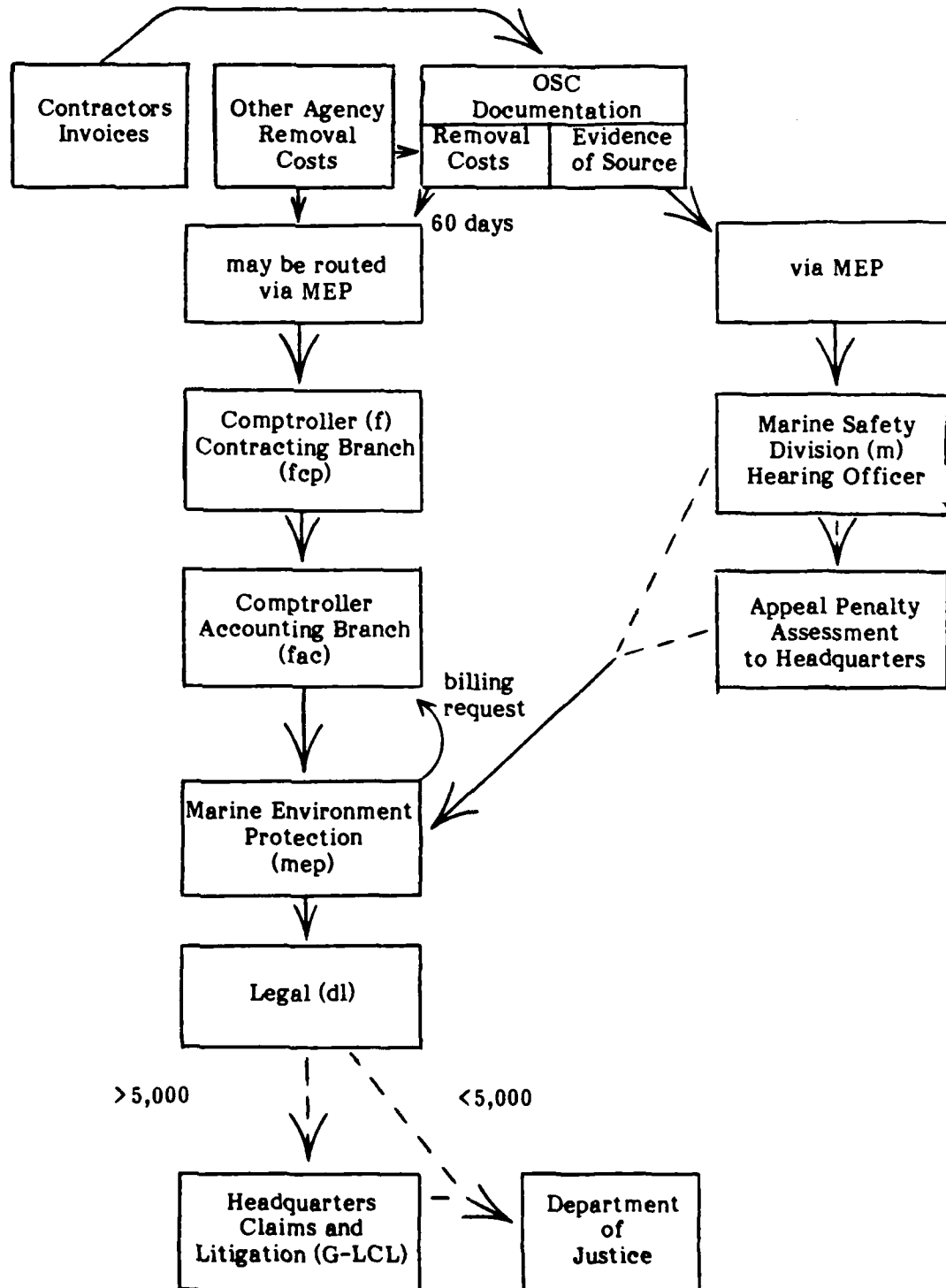
reader. Since no purpose would be served by providing a detailed analysis of each district's procedure, I will attempt to describe the procedural steps common to most districts, describe some important differences, and highlight where sources of improvement may be found. The description of procedural steps will also extend to the collection of the Claims and Litigation Division (G-LCL) in Coast Guard Headquarters, and procedures of the Justice Department.

There are several reasons for outlining the steps of the collection process, the most obvious being to offer the reader an understanding of the process. Secondly, it is a convenient setting for interjecting pertinent expert opinion and anecdotal evidence from the interviewed attorneys who can best observe what types of persuasion the collection system is capable of exerting on the polluter. Lastly, an overview of the process makes apparent what most of the interviewed attorneys identified as the principle weakness of the collection process—the slowness of the system, which interviewees characterized as "devilishly" slow, "ponderous" and "convoluted". In the course of this discussion, the reader is urged to follow the procedural flow diagram in figure 4.

The OSC and documentation. The OSC is responsible for the first step in the collection process—documentation.³⁷ Documentation serves two main purposes insofar as cost recovery is concerned: first, it provides the evidence used to identify the polluter; second, it forms the record of the removal operation that becomes the basis for reimbursement claims against the polluter. These two purposes correspond to the two different tracks that are pursued at the district for a Federal spill with a known polluter—the penalty track and the removal cost reimbursement track. The OSC certifies removal cost invoices and should forward this and other removal documentation to the district commander within

³⁷ Nat. Oil and Haz. Plan, (1980), pt. 1510.55.; U.S. Coast Guard, Commandant Instruction 16450.1.

Fig. 4. Procedural step flow diagram for collection of Federal spill removal costs



60 days of the completion of the cleanup. For a larger, protracted cleanup, the OSC periodically forwards the certified invoices to the district so that the contractors can start receiving payments.

Since the OSC's documentation of the incident forms the foundation for subsequent stages of the collection process, I asked the district legal officers whether the quality of the investigations and documentation has been significantly detrimental to the collection process. They were split in their opinions. The general consensus was that documentation was quite good and improving. Several complained that documentation of expenses, especially Coast Guard expenses, needed considerable improvement. Unclear or insufficient documentation to justify an expense was also identified by Headquarters and Justice Department attorneys as commonly leading to reduced settlements of cleanup costs. Half of the district legal officers noted that when a case went to court, more information was usually needed from the OSC. One perspective was that the man on the scene, normally a young petty officer, does not see the case with an eye toward litigation and often overlooks obvious elements of a case. For example, these elements range from improper identification of the polluting corporate entity to a missing piece of evidence required to tie the pollution source to the pollution in the water. These perceptions are quite interesting since normally a year passes before an attorney first sees the evidence and considers its adequacy for possible litigation.

Yet most of the attorneys did not want to implement procedures requiring an attorney to review the evidence during the documentation stage, not even for larger spills. They considered themselves in a staff position available to help the OSC at his request and did not want to interfere with the OSC's autonomy. Some also questioned whether the benefits of attorney review would exceed the costs, especially since their workload was already excessive.

The comptroller and preparation for demand of payment. The certified invoices and supporting documentation are first acted upon by the contracting branch (fcp) of the comptroller division (f). Some districts have pre-negotiated annual contracts with cleanup contractors. Where this is the case, (fcp) verifies the certified invoice costs with the contract prices. If there is no contract, one must be negotiated by (fcp) prior to verifying the vouchers. Federal spills costing over \$100,000, and some smaller spills, are audited by auditors from outside the agency.³⁸ This takes about 30 days and is an additional transaction cost of the Federal spill. Upon completion of the accounting steps, contracting makes up a purchase order for the verified amounts and sends the package of materials to the accounting branch (fac) for payment.

The accounting branch (fac) processes a disbursement that is ultimately paid by a regional disbursing office. The detailed contracting and accounting procedures used by (fcp) and (fac) are done according to the requirements of the Comptroller Manual³⁹ and the Federal Procurement regulations.⁴⁰ They are beyond the scope of this paper.

Accounting retains cost documentation data until the marine environmental protection branch (mep) requests a billing for the polluter. Until this point, the bills have been processed and paid with the comptroller division having no need to know the identity of the polluter or whether or not an identity was even known.

The marine environmental protection branch (mep) requests the billing when the first two criteria below are satisfied, and in some districts the third criteria also is required.

³⁸Interview (telephone) with Frank Roche, Chief Procurement Branch, Ninth Coast Guard District (f), Cleveland, 6 June 1980.

³⁹U.S. Coast Guard, Comptroller Manual, p. P-3.

⁴⁰Code of Federal Regulations 41, pt. 1 (1978).

1. The cleanup is complete and the comptroller has processed all of the remaining invoices.
2. There is sufficient evidence to identify the polluter.
3. The penalty track is complete.

Not until this point of the collection process can the first demand letter be sent to the polluter. I will reserve discussion of who sends letters as this varies considerably from district to district. An explanation of the penalty track is now in order.

Penalty Track. Upon arrival at the district, the evidence identifying the polluter, along with a report of violation, goes to the district's administrative hearing officer in the marine safety division (m). The FWPCA mandates that a civil penalty be assessed against the polluter in the discharge of all pollutants prohibited by the FWPCA.⁴¹ It is the duty of the hearing officer to look at the evidence, offer the alleged polluter an opportunity for a hearing, and assess a penalty. The polluter can choose to appeal this penalty to the Commandant of the Coast Guard. If the alleged polluter chooses to exhaust all of his options in these administrative proceedings, the penalty track can take much time and it may further delay the removal cost collection process in those districts wanting the penalty resolved before proceeding with removal cost recovery.

A number of the legal officers, especially those at Headquarters and the Justice Department, identified the penalty track as a prime source of delay for the collection process. Apparently this was true but at the urging of Claims and Litigation (G-LCL) most districts no longer hold up the collection until the penalty track is complete. Of the ten districts studied, only two waited for completion of the penalty track and three districts usually waited for the penalty assessment.

Apparently the main purpose in delaying the removal collection pending penalty assessment was to avoid the potential embarrassment of billing a party for

⁴¹U.S.C.A. 33, sec. 1321(b)(3).

removal costs if the penalty track has deemed that evidence is inadequate to assess a penalty. However, each collection track is different and the penalty assessment should not influence the removal reimbursement. There is also a certain amount of redundancy when both the hearing officer and legal officer look at the same facts of the case but with different purposes—one to assess a penalty and the other to collect removal costs. The maximum civil penalty is \$5,000, and is normally far less. On the other hand, the cost of removal almost always far exceeds the penalty. This explains the trend to proceed with the removal collection process and risk some possible redundancy or embarrassment.

District legal and demand letters. At some point after the recalcitrant polluter fails to heed the demand letters from (f) or (mep), the cost data and the evidence identifying the polluter are forwarded to the district legal office (dl) for further administrative collection efforts. Most of the ten interviewed district legal officers stated that cases involving removal claims were normally over one year old by the time (dl) received them, and some recent collection cases were said to be in the three to five year age range. Usually this is the first point in the collection process where an attorney reviews the case. I was somewhat surprised by this and asked if there were any special procedures for handling costlier Federal spills where an attorney might review the sufficiency of the evidence as it was collected, and where the processing of the claim would be expedited through the entire system. There were no such formal procedures. Most attorneys said that both of these might be done on an ad hoc basis. Generally, the consensus was that the cost collections traveled through the administrative offices at about the same speed as the smaller, less complicated cases. Most legal offices (dl) sent another demand letter and attempted to personally contact the polluter if this had not yet been done. Figure 5 shows the points at which written demands for payment are sent in each of the ten districts where legal officers were interviewed

for this paper. Note that some districts send three or four demands while others send only two based on the reasoning that if the district collecting is unfruitful, statutory standards are fulfilled by the demands from Headquarters or the Justice Department.

Most of the interviewed district legal officers noted that the attempted time interval between demand letters was 30 days. But normally, it took a half year, and often more, from the first demand until the end of the response period on the last demand. Many of the officers indicated that the time span had been longer in the recent past and they were now improving follow up demands with methods ranging from checking "tickler" files more frequently to automating the caseload data with the word processor computers.

The 30 day and more intervals currently spent waiting for responses to demand letters is "dead time" in the collection process. It is interesting to note on figure 5 how many of the districts expend this dead time when the case is in the hands of (fac) and (mep) thereby further delaying the time when an attorney with an "eye for litigation" can review the case. Moreover, a number of attorneys were of the opinion that the chance of a collection in response to a demand letter went up if the letter was from a lawyer and was further improved if it was from the U.S. Attorney's Office. Another reason to rapidly move a case to the legal office and higher is that these levels have more methods of effecting a collection than passively waiting for a response to a letter as (fac) and (mep) must do.

Additional collection tools. Besides the written demand, at the district legal (dl) level there are three additional tools for handling cases where the total costs (cleanup and penalty) do not exceed \$5,000. The claim may be (1) compromised; (2) suspended or terminated; or (3) referred to the Justice Department.⁴²

⁴²C.F.R. 33, pt. 25.1609.

Fig. 5. Written demands for removal cost reimbursement, by originating branch/office, for each of the ten Coast Guard districts in the contiguous United States

branch/ office	1st MA	2nd MO	3rd NY	5th VA	7th FL	8th LA	9th OH	11th CA	12th CA	13th WA
(fac)			#1	#1 #2			#1 #2 #3	#1 #2		
(mep)	#1	#1			#1 #2 #3					#1
(dl)	#2	#2 #3 #4	#2 #3	#3		#1 #2	#4	#3	#1 #2 #3	#2

All cases over \$5,000 that cannot be fully collected by (dl) are referred to the Claims and Litigation Division (G-LCL) at Headquarters where cases may be fully collected or compromised, suspended or terminated if the cost is less than \$10,000 (and less than \$20,000 in the case of the Chief Counsel of the Coast Guard).⁴³ Cases exceeding \$20,000 that cannot be collected in full by Headquarters must be referred one more step to the Justice Department which has the most options available for collecting a case. They may compromise, suspend or terminate, or litigate a case. The Justice Department also has a system for routing cases internally but this routing is beyond the scope of this paper.

The problem of time. Notice that up until the point where the case may be referred to the Justice Department for litigation, the polluter need spend little, if any, money to counter administrative efforts. In fact, he is probably better off ignoring demand letters in order to ensure that follow up demand letters must be sent, thereby buying more time and extending use of the claimed amount which may ultimately be paid. How long is it before a lawsuit pends? One attorney noted that a case may easily be two years old before a trial is even planned.⁴⁴ Another attorney who sees the larger dollar amount cases involving discharges from shore facilities noted that it seems that the statute of limitations (three years) has almost run out by the time many of these cases reached his office—most were two and one half to three years old.⁴⁵ Those over three years old are normally not referred to the Justice Department because of both stale evidence

⁴³U.S. Coast Guard, "Delegation of Authority regarding Claims and Litigation," paper distributed at District Legal Officers Conference, May 1978. (Typewritten.)

⁴⁴Interview with Cain, Washington, D.C., 5 May 1980.

⁴⁵Interview (telephone) with Donald Stever, Chief, Pollution Control Section, Lands and Natural Resource Division, Justice Department, Washington, D.C., 3 June 1980.

and the statute of limitations. Since they are not litigable, they are either administratively collected or considered to be uncollectable.

Table 3 shows the ages of the population of cases that were pending in (G-LCL) at Headquarters in June, 1980 and their age upon arrival at (G-LCL). Two of the five cases exceeding \$100,000 were referred directly to (G-LCL) within a few months of the date of the incidents. They certainly are exceptions to the procedural mechanism described thus far.

Several of the attorneys from Headquarters and the Justice Department offhandedly commented that the statute of limitations should be extended and almost in the same breath, they corrected themselves by noting that that is not the answer to the problem—the answer is to speed up the system and get cases over to the Justice Department quickly. They commented that once a case is over a couple of years old, it is often so stale that it "cannot go anywhere". Symptoms of a stale case include evidence that has not been preserved, witnesses who have moved, the Coast Guardsmen who gathered the evidence have been transferred or left the service, and those witnesses who are found remember few facts. The quality of the case has declined and it has become ripe for compromise, suspension, or termination.

Federal claims collection standards state that referrals to the Justice Department for litigation should

. . . be made as early as possible consistent with aggressive agency collection action . . . and in any event well within the time limit for bringing a timely suit against the debtor.⁴⁶

The inherent sluggishness of the administrative collection process described in this subsection appears to defy any attempt to stretch definitions and say that the Coast Guard has an aggressive collection process. It is indeed a convoluted and

⁴⁶C.F.R. 4 , pt. 105.1.

TABLE 3

AGES OF OPEN, UNLITIGATED REMOVAL CASES IN (G-LCL) IN
JUNE 1980, AND THEIR AGES UPON ARRIVAL AT (G-LCL)
(Ages in Months)

\$ Amount Claimed (000's)	No. of Cases	Age When Recieved From District Legal			Age on June 1980		
		Mean	S.Dev.	Range	Mean	S.Dev.	Range
<20	11	29	18	7-65	40	18	10-72
20-100	8	22	7	9-34	29	9	11-41
>100	5	16	17	1-40	26	15	3-46
Total	24	24	16	1-65	33	16	3-72

SOURCE: Adapted from U.S. Coast Guard, Commandant (G-LCL), word processor printout of pending FWPCA Claims in (G-LCL), Washington D.C., 11 June 1980.

devilishly slow process.

One attorney noted that it was difficult to see who is the spokesman for the fund—who was concerned about getting money into the fund? The process is certainly fragmented, with many people moving paper to accomplish their particular job but not in touch with the ultimate objective of effecting collection. Collection steps are easily delayed because there generally is no prodding to rush the case through each step. The problem is compounded by each branch or office being responsible for many other Coast Guard missions and support functions. The nature of emphasis varies between branches and in districts and from one district to the next. For example, the Seventh District in Miami is located near the gateway of much of the drug traffic entering the United States and they must place a very strong emphasis on drug law enforcement programs. When one of the interviewed attorneys is assigned to a task requiring immediate attention, such as a court martial, the collection case must be set aside and may be delayed. The present procedure is not conducive to an aggressive posture when the collection process is simply routine paperwork at many stages and, as such, does not carry the same priority as operational commitments, such as the pollution response itself. Nor are there parts of the Coast Guard organization that actively stimulate an aggressive collection action throughout that procedure.

Compromising, suspending, and
terminating claims

As we previously noted, these methods of settling a collection claim are available to the district legal office (dl), Claims and Litigation (G-LCL), and the Justice Department to varying degrees. The compromise is an often used, important tool for recovering part of a claim and all of these methods also enable the polluter to avoid liability for the full cost of a removal. Appendix 3 is a copy of the Federal Claims collection standards. The standards most often noted by the interviewees are as follows:

- Inability to pay
- Litigative probabilities
- Cost of collecting a claim
- Enforcement policy

Inability to pay. No collection can occur or be enforced if a polluter has no assets or is otherwise judgment proof.⁴⁷ The standards go further than this in allowing compromises based on the debtor's ability to pay.⁴⁸ Therefore, even corporate debtors do not necessarily need to liquidate assets in bankruptcy proceedings in order to settle a claim exceeding those assets.

Litigative probabilities. If a claim has no legal merit, collection action should be terminated. Given the often prolonged collection process, it is also interesting to note that a collection should be terminated when the evidence to prove a claim cannot be produced, or the necessary witnesses are unavailable, and efforts to induce voluntary payment are unavailing.⁴⁹

The above termination criterion are also criteria for compromising a claim. From the interviews, it seemed as though apprehension concerning the outcome of litigation was a predominant criterion for compromising claims. The primary sources of apprehension, and hence reduction of claims recoveries, were the four defenses permitted by law. For example, the \$2.6 million recovery sought for the cleanup of a spill from the grounded tankship Global Hope in 1978 was settled for only \$1.5 million largely because the Government attorneys were apprehensive that the court would award nothing or much less than claimed.⁵⁰ The "act of God" defense would have been argued because there was heavy weather during the

⁴⁷Ibid., pt. 104.3(a).

⁴⁸Ibid., pt. 103.2.

⁴⁹Ibid., pt. 104.3(e).

⁵⁰Interview with Cain, Washington, D.C., 5 May 1980.

incident, and "negligence of the U.S. Government" would be argued because, while attempting to lighten the vessel, the Coast Guard's Atlantic Strike Team mistakenly pumped oil into the water, thereby contributing to the spill. It is curious that Government negligence is a defense even though the Government is forced to act in a stressful situation because the polluter is unable to act or refuses to act. One would think that these circumstances may be justification for either eliminating this defense or requiring proof of gross negligence before absolving the polluter of liability.

There are no statistics maintained whereby the effect of defenses on compromised cases can readily be ascertained. However, this one example, and many other cases, does lend credence to Mendelsohn's contention that defenses ". . . will inevitably stimulate unnecessary litigation as well as delay and probably depress most recoveries."⁵¹ (emphasis added)

Cost of collecting claim. Several attorneys estimated the Government's cost of litigating a small claim to be around \$2,000 to \$3,000. A small removal, say less than \$5,000, would certainly be ripe for compromise or even termination if it is reasoned that the cost of litigation will exceed recovery.⁵² Although most of the legal officers had good relations with the local U.S. Attorneys, some districts did have to do much of the case preparation as an incentive for the U.S. Attorney to prosecute the case rather than shelving these smaller cases. But it was pointed out to me that having the time to prepare a case for trial is a luxury that many districts cannot afford.⁵³ The cost of collection does not normally carry great weight in the settlement of large claims.

⁵¹Mendelsohn, Marine Liability, p. 24.

⁵²C.F.R. 4, pt. 103.4.

⁵³Interview (telephone) with LCDR Mark Troseth, Legal Officer, Fifth Coast Guard District (dl), Portsmouth, VA., 23 May 1980.

Enforcement policy. Although this standard does not directly apply to removal cost recovery, it is analogous to one aspect of the current compromising policy. This standard⁵⁴ permits a collection to be compromised if the agency's enforcement policy, in terms of deterrence and securing compliance, will be adequately served by acceptance of the sum agreed upon. This standard is pertinent to penalties and other enforcement aids rather than the removal liability topic of this paper, however, there seems to be a similar natural point of compromising Federal spill costs. As was previously noted, the polluter is liable for actual removal costs. Typically most of these costs came from the pollution fund and the remaining costs came from agency operating funds. A number of the district legal officers pointed out an implicit settlement goal of recovering at least the amount expended from the pollution fund and compromising within the range of the other removal costs.

Another enforcement policy standard directs that claims under \$600 not be referred to the Justice Department unless referral is important to a significant enforcement policy, or if the Government has a good case and the polluter clearly has the ability to pay the claim.⁵⁵ Most districts did refer these claims and sometimes prepared the litigation. One district would not forward these small claims to the Justice Department.

The precise application of settlement standards cannot be characterized. The art of negotiating a settlement is unique to the circumstances of each case as well as the interpretations of policy, and the skills of the attorneys. However, it is apparent from the interviews that the recalcitrant polluter can usually settle for less than he owes.

⁵⁴C.F.R. 4, pt. 103.5.

⁵⁵Ibid., pt. 105.6.

Chapter Summary

I did not learn of any aspect of the administrative collection process that offers the recalcitrant polluter incentive to readily reimburse the Government for Federal spill costs. To the contrary, the whole system begs the polluter to ignore demand letters and search for a defense or other grounds for settlement when and if litigation becomes imminent. It is the expense of imminent litigation, and not the threats contained in sporadic demand letters, that can compel the knowledgeable polluter to pay or to work for a settlement. Therefore, it seems imperative to expeditiously route a case through the system to a level with both the authority to settle and an "eye toward litigation". In addition to litigation, the law allows pressure to be asserted by listing the debtor with a commercial credit bureau. Just as many people fear to be sued, they also do not want a bad credit rating. But the present system neither uses nor threatens the use of this method.

The previous sections have revealed many characteristics of the system that not only thwart rapid referral to the level that can act affirmatively, but decrease the quality of the case and ultimately decrease the amount collected. Some of these characteristics are as follows:

- Incomplete documentation of removal costs
- Insufficient evidence to prove case in court
- Delayed first demand letter caused by OSC and/or comptroller delays
- Penalty track interference with the removal collection
- Excessive dead time in the course of sending demand letters
- No active control exerted over the system as a whole

Many of these and other characteristics of the system are ambiguous and difficult to statistically define. The system just plods along with little interplay between the parts which vary widely in their functions and are therefore difficult to control. Yet there is a clear superordinate goal to strive for if the system's

purpose is to recover Federal spill costs from the polluter. This goal is to provide good quality documentation to the level that can apply the most leverage to the polluter—and do it quickly and aggressively.

IV

THE EXTENT TO WHICH THE POLLUTER HAS INCURRED REMOVAL COSTS

The two preceding chapters have shown numerous legal and administrative disincentives for the polluter to voluntarily incur the cost of pollution removal. This chapter analyzes available program statistics showing both the extent that the polluter has incurred removal costs, and identifying trends that may be indirectly correlated with the legal and administrative incentives of the program.

Statistical data sources describing a case are generally scattered among the different administrative offices described in chapter three. As may be expected, data are maintained to serve the purposes of those offices and are certainly not compiled in such a manner as to be convenient for this study of the whole collection process.

I was initially somewhat apprehensive about the availability of hard statistical data for this study. My fears were realized during a research visit to Coast Guard Headquarters in Washington, D.C. I had obtained a list of the eighty most expensive Federal removals and naively intended to comparatively analyze their characteristics including the legal and administrative factors of the cost recovery process. My plan was aborted when I learned that the legal case files were stored wherever the case pended in the collection process. This location could be the district, a U.S. Attorney's office, Headquarters, in one of several

Justice Department offices, or the case might be closed and in a central file. Therefore, most of the data that might have been used to determine the existence and prevalence of legal and administrative collection problems described in chapters two and three were either tucked away in a case file or was now part of the experience of a program administrator. For these reasons, I was dependent upon the interviewees for most program data.

Furthermore, I found that a case is identified by many different numbering systems as it winds its way through the bureaucracy and there is generally no attempt to cross reference the numbers. Each Federal spill is known by its Federal spill project number in the comptroller offices, a Pollution Incident Reporting System (PIRS) number in the marine environment protection program offices, and legal case numbers, litigation numbers, or docket numbers in the various Coast Guard and Justice Department legal offices. Any attempt to piece a case together from the data bases of different offices must be preceded by an arduous task of correlating case numbers and then gaining access to the files. One financial manager jokingly told me about a million dollar case whose legal file was lost and could not be traced — eventually, it was found.

Of the three administrative areas involved in collections—finance, marine environmental protection, and legal—none appear to collect program data with the intent of using it as a management tool to learn of collection problems and then address those problems.

The legal offices work on a case by case basis and do not formally compile data. Many legal offices have recently received word processor computers but it remains to be seen whether they will serve as administrative aids to process paper, or management tools, or both.

Two data bases have been maintained throughout most of the program life and together they offer the best available removal statistics. These are the

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OIL AND HAZARDOUS MATERIAL CLEANUP LIABILITY: A STUDY OF LEGAL --ETC(U)

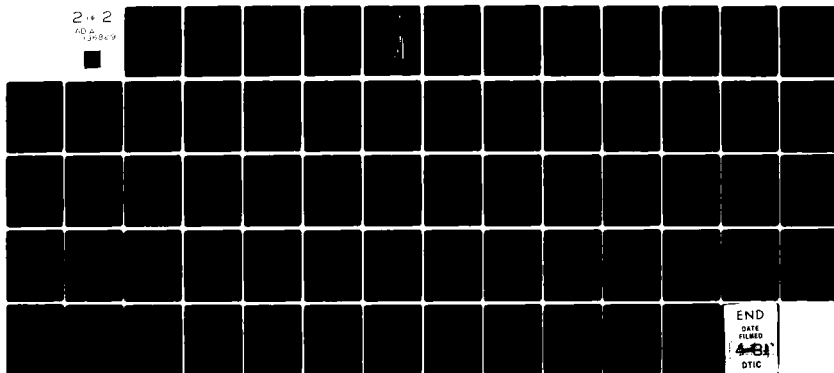
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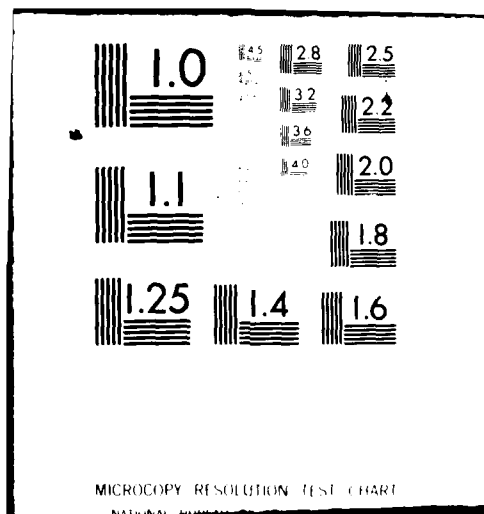
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Pollution Incident Reporting System (PIRS) and the financial data base maintained in conjunction with administering the pollution fund. These data bases both offer symptomatic evidence in support of the previously presented evidence that the law and its administration are ineffective tools for compelling the polluter to incur the costs of removal.

PIRS Discharge and Removal Data

The PIRS data bank

PIRS information has been collected since December, 1971. The WQIA made this data base possible by requiring any discharge of oil or hazardous substance to be reported to the appropriate agency of the United States under the threat of criminal penalty.¹ The Coast Guard has been designated as that agency.² Data on all reported discharges are ultimately encoded and entered into the PIRS computerized data bank. Selective criteria can be retrieved and organized in different combinations.³ Initially, only the characteristics of the discharge were collected. In 1973, the system was expanded to its present form which includes data concerning removal and penalty actions. Therefore, the PIRS data presented here will be from 1974 through 1978 or 1979.

As is the case with any comprehensive data base collected by thousands of different people, PIRS data are fraught with errors of collection and encoding despite data review at the district level and further editing at Coast Guard Headquarters. For example, no one can precisely state the volume of a discharge on water or on a beach. This skill is an art. Yet specific estimates are encoded in

¹U.S. Code Annotated 33, pt. 1321(b)(5), (1974).

²Assignment of Presidential Functions, Federal Register 38, 21243 (3 August 1973), Ex. Order No. 11735.

³U.S. Coast Guard, PIRS Coding Instruction Manual, Commandant Instruction M16450.25, 1980.

PIRS and the data user must trust that errors have averaged out as the sample size increases. This type of error cannot be removed by editing. Even so, the strength of PIRS lies in its discharge data and few pieces of data are collected that may enlighten this study of legal and administrative problems. In fact, the administrative area that is addressed by PIRS is touched upon only lightly.

This administrative area is the penalty collection process. The often more financially significant removal cost collection process is not addressed. Perhaps this is because the hearing officers who assess penalties work in the same program area as the office managing PIRS, where the collections of removal costs are primarily program support functions performed by finance and legal. The dearth of removal data may just as well be justified for two reasons. First, PIRS is chronically missing follow up data that could not be submitted with the first report. Hence, PIRS is relatively reliable insofar as discharge data are concerned, while removal and penalty assessment data are incomplete.⁴ Second, although PIRS purports to supply program management and planning information, it does not appear to do this with respect to the program administration. For example, there are eighteen different elements and numerous separate actions that can be encoded to PIRS to describe at what stage the penalty process was in each incident; however, not so much as one date is entered. Knowledge of procedural timespans is almost mandatory for identifying administrative bottlenecks and other aspects of administrative performance. This, together with incomplete data, makes for a rather passive and unreliable administration evaluation tool.

Discharge data and removal party trends

PIRS data exhibits an intriguing trend toward increased Federal removal

⁴Interview with ENS. Paul Fulton, U.S. Coast Guard (G-WER), Washington, D.C., 6 May 1980; Interview (telephone) with LT Mark Ives, U.S. Coast Guard (G-WPE), Washington, D.C. 30 June 1980.

and decreased removal by the polluter. Before presenting that data, I will present a somewhat broader picture of discharge and removal statistics.

Table 4 gives the gross discharge and removal data for the most recent five years for which statistics are complete. There was a mean of 13,668 pollution reports per year with a standard deviation of plus/minus 9 percent. A rather consistent 83 percent of the annual reports were oil spills while most of the remainder in the "Other" category were unknown substances that were unseen or not identifiable when the pollution investigator arrived on scene. Removal measures were commenced for a mean of only 3,872 incidents per year, or 28 percent of the total reported discharges.

Figure 6 presents the mean discharge and removal data for these same years and further categorizes incidents by the volume of the discharge. As a general rule, cleanup is not performed if it is not feasible to do so, such as when the pollutant is widely dispersed and no removable concentrations of pollutant would remain by the time a contractor could arrive. This would be the case with the unconfirmed reports and widely dispersed iridescent "sheens" of oil. As may be expected, as the spill size increases so does the percentage of removals. This statement does not appear to hold true for the largest categories but this may be explained by the greater influence of PIRS errors and other variations in the smaller sample sizes.

Figure 7 presents the party performing the removal as a percentage of the total annual removals. It includes 1979 data. There is a notable trend toward increased Federal removal and decreased removal by the polluter. Admittedly, the most conspicuous elements of the figure are the tall bars showing the great majority of removals performed by the polluter. Trend lines extended from the polluter and Federal spill data forecast that polluter removed spills would equal Federal spills within twenty years. The other "agency or state" removals

TABLE 4
PIRS POLLUTION INCIDENT AND REMOVAL
TOTALS FOR 1974 - 78

(Percent of Annual Total
is in Parentheses)

Year	Pollutant			Total	Removed
	Oil	Hazardous Substances	Other		
1974	11,435 (82)	2,531 (18)		13,966	4,524 (32)
1975	10,141 (84)	1,916 (16)		12,057	3,381 (28)
1976	10,660 (84)	1,995 (16)		12,655	3,399 (27)
1977	12,605 (82)	289 (2)	2,436 (16)	15,330	4,058 (26)
1978	11,816 (82)	260 (2)	2,257 (16)	14,330	3,996 (28)
Mean	11,331 (83)			13,668	3,872 (28)
St. Dev.	864 (1)			1,176	434 (2)

SOURCE: U.S. Coast Guard. Polluting Incidents in and Around U.S. Waters for calendar years 1974, 1975, 1976, 1977, and 1978. Washington, D.C., which is based on PIRS Data; and for the removal statistics—PIRS Data, U.S. Coast Guard Headquarters.

Fig. 6. Annual mean of reported 1974-1978 oil and other polluting substance incidents broken down by discharge quantity and where removal was performed.

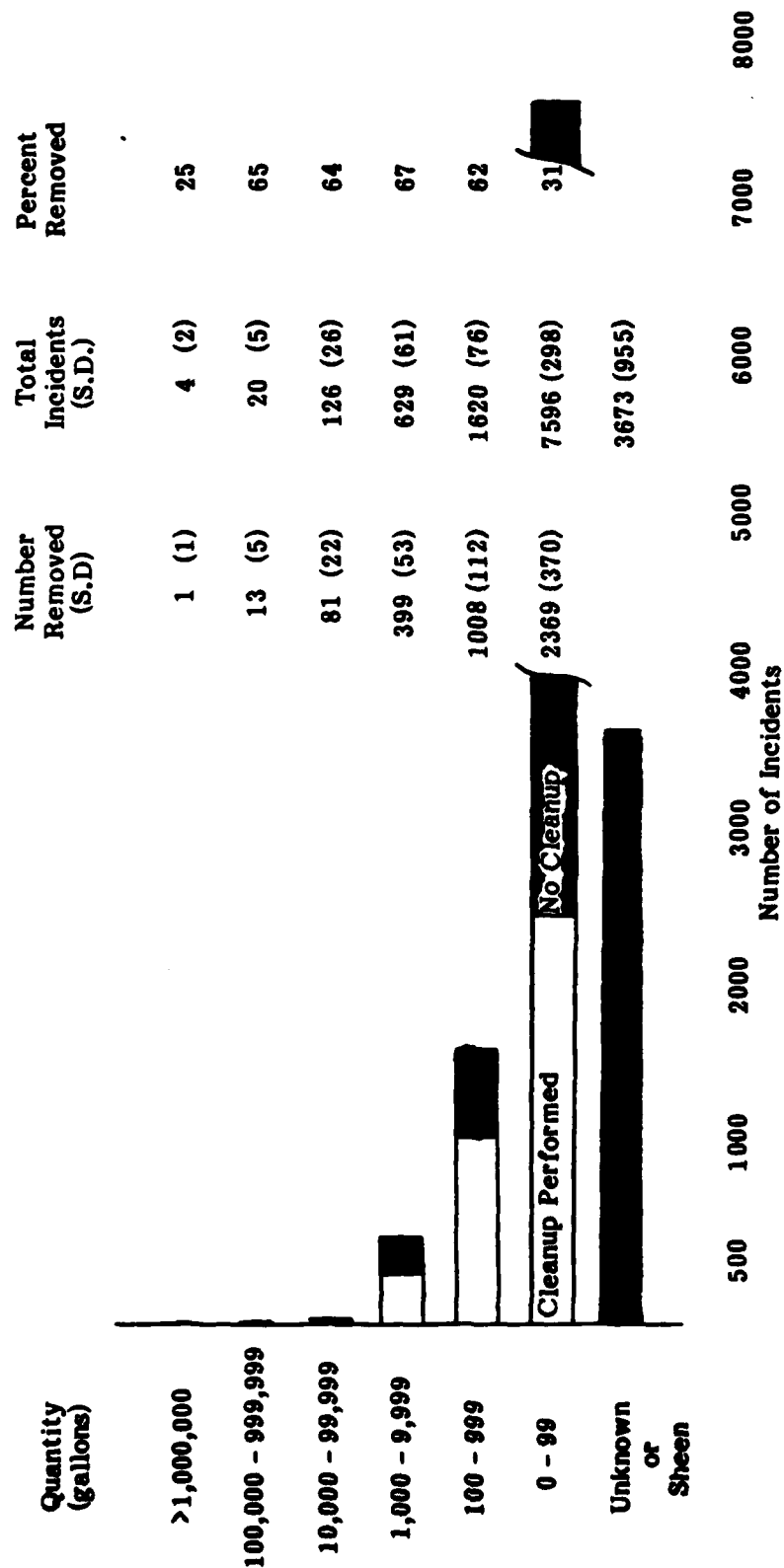
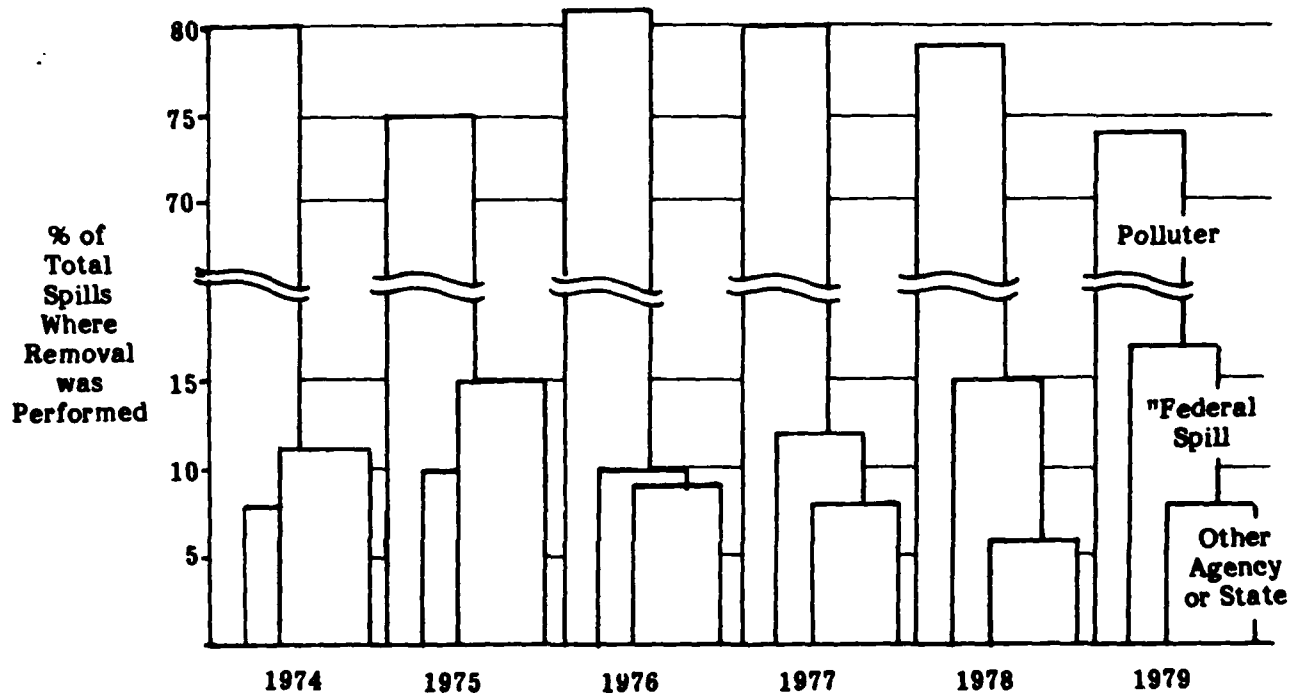


Fig. 7. Pollution removal by party as a percentage of total annual removals



primarily refer to other government spills, most of which cannot legally be declared Federal spills with removal funded by the pollution fund.⁵ The majority of these discharges come from naval vessels and facilities and removal must be funded by the polluting agency. Since these predominantly "public spills" are not pertinent to our subject of compelling the polluter to pay for removal, I thought it necessary to present a narrower trend picture.

Figure 8 deals only with incidents removed by the polluter and Federal spills. The sum of these two categories represents total potential number of Federal spills should the polluter always refuse to perform discharge removals. The trend is the same as that shown by the previous figure 7, but it is more pronounced and polluter removed spills would equal Federal spills within fifteen years.

After seeing this trend, I again calculated the percentage of removals by party, but this time I further broke down the data by the same discharge size groupings used in Figure 8 above. I expected to see the same trend toward increased Federal removal more pronounced in the larger spills where removal is usually more costly. However, this was not the case. The populations in the larger spill categories were too small to allow any inferences to be drawn from the data.

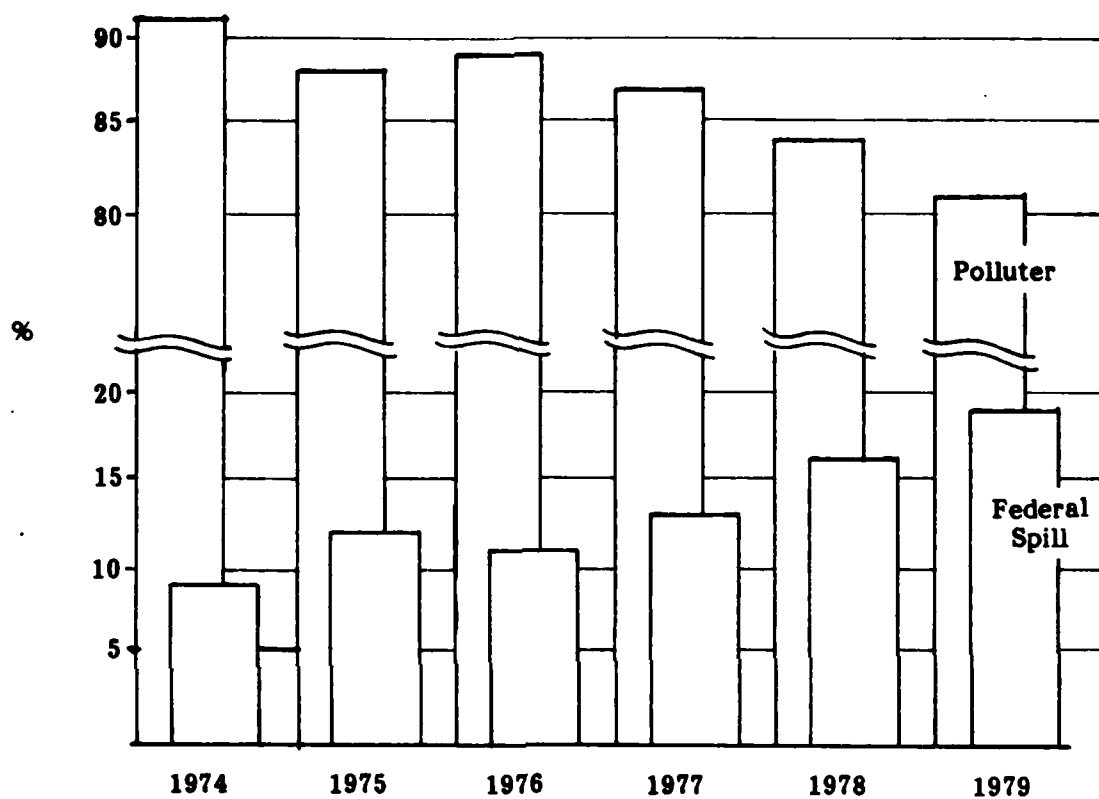
The second of the continuously maintained data bases is the financial accounting data associated with Federal spills.

Pollution Fund Financial Data

Pollution fund financial data represent a prima facie case that the law, its administration, or both, are inadequate for the task of compelling the polluter to incur removal costs.

⁵Interview with Ives, 30 June 1980.

Fig. 8. Polluter and Federal spill removals as a percentage of total potential Federal spill removals (not including other agency and state removals)



Pollution fund accounting

In previous discussions of the law and its administration, I have mentioned the pollution fund. The law calls for the fund to be "revolving" in that it pays out money for Federal spills and receives money as removal claims against polluters are recouped.⁶ Of course, expenditures will exceed receivables. This is assured by the limitations and standards of liability inherent in the law, plus the inevitable discharges from unknown polluters. To compensate accordingly, the fund is also sustained by monies collected from civil penalty assessment. In theory, the fund should be self-sufficient once there is an initial start up appropriation. In practice, there is a continual drain on the fund balance which has been countered by periodic Congressional appropriations. The legal amount of the polluter's liability and the administrative methods of fixing that liability have not permitted the fund to operate as a revolving fund. A look at the pollution fund financial data makes this inadequacy readily apparent.

The district comptrollers maintain Federal spill accounting data and periodically forward these data to the Office of the Comptroller at Coast Guard Headquarters. There the data are frequently compiled into a financial summary of collections and obligations in order to monitor the pollution fund level and ascertain when to seek supplemental appropriations. The raw data compiled at Headquarters generally consist of only a few financial elements of the incidents. For example, a recent summary of accounts receivable was compiled from district submissions consisting of the Federal spill number, debtor's name, date established, amount receivable, amounts collectable and uncollectable, and where collection action was being performed at the present.⁷

⁶U.S.C.A. 33, sec. 1321(k).

⁷U.S. Coast Guard, "Pollution Fund - Allowance for Uncollectable Accounts for Period Ending 31 March 80, 1980. (Copy of handwritten ledger and district submissions).

Financial data

Table 5 summarizes the financial history of the pollution fund. As noted by a Coast Guard memorandum proposing to stabilize fund balances,

. . . the Fund exhibits an average annual drawdown, i. e., expenditures exceeding collections of \$8 million. It took us four years to draw down the initial \$20 million appropriation. It has taken only three years to draw down an additional \$31.3 million in appropriations. While the overall historical drawdown rate is \$8 million per year, the recent rate has averaged nearly \$12 million per year. There is every indication that the \$12 million figure will not decrease, and most likely will show significant increases . . .⁸

Interestingly, the memorandum goes on to propose stabilizing the fund through a series of actions all related to seeking supplemental appropriations. Nothing is said about the role of the legal liabilities of the polluters or the administrative collection process in contributing to fund losses.

Actually the table 5 financial summary paints a rather rosy picture of Federal spill expenditures and it is this picture that is presented to the House subcommittee that annually reviews Coast Guard appropriations.⁹ The summary provides an overly optimistic picture in two ways. First, the total obligations represent only documented removal costs and do not include the inevitable undocumented costs of a Federal removal, nor the transaction costs connected with the removal and subsequent collection efforts. Second, the amounts collected for actual removal costs are far less than is shown in the collection column as these figures are bolstered by fine and penalty collections. Despite the small amount of most individual fines and penalties they account for a sizable portion of collections as a comparison of table 6 collections with table 5 above shows.

⁸U.S. Coast Guard, "Proposal to Stabilize Balances in the FWPCA Section 311(k) Pollution Fund," memorandum from Chief, Office of Marine Environment and Systems to Chief of Staff, 13 February 1980.

⁹U.S., Congress, House, Committee on Appropriations, Department of Transportation and Related Agencies Appropriations for 1979, Hearing Before the Subcommittee on the Department of Transportation and Related Agencies, 95th Cong., 2nd sess., 1978, pp. 370-72.

TABLE 5

**FEDERAL WATER POLLUTION CONTROL ACT, SECTION 311(k)
REVOLVING POLLUTION FUND FINANCIAL SUMMARY
(In Dollars)**

Fiscal Year	Appropriations	Collections	Expenditures
1971	20,000,000	47,675	288,255
1972		311,536	892,292
1973		634,981	9,439,340
1974		2,410,741	4,429,964
1975		1,999,602	7,974,507
1976 +TQ	10,000,000	3,650,788	15,318,825
1977	5,000,000 ^a	6,888,149	8,643,653
1978	10,000,000	7,144,493	9,922,986
1979	(3,500,000) ^b	5,105,112	18,741,710
	13,000,000		
1980 (1st Qtr)	10,000,000	2,501,987	6,182,203
Total	64,500,000	30,695,064	81,833,733

SOURCE: U.S. Coast Guard, "Federal Water Pollution Control Act Section 311(k) Financial Summary," 21 February 1980. (Typewritten)

^aTransfer of Funds from Coast Guard Acquisition, Construction, and Improvement (AC&I) appropriations.

^bTransfer of funds to AC&I appropriations.

TABLE 6
SUMMARY OF FINES AND PENALTIES COLLECTED FOR THE
POLLUTION FUND FISCAL YEARS 1971-1976
(In Dollars)

Fiscal year	Number	Average	Amount
1971	2	138	275
1972	215	330	71,024
1973	1,520	601	913,853
1974	3,776	581	2,195,221
1975	4,092	482	1,970,769
1976	5,274	410	2,160,938

SOURCE: General Accounting Office, "Summary of Fines and Penalties assessed and Collected, U.S. Coast Guard, Fiscal Year 1971-1976," cited by U.S. Coast Guard, "Pollution Fund Significant Data," February 1977. (Typewritten).

The bulk of the pollution fund expenditures and receivables are for a few major removal incidents. As shown in table 7, from 1972 until September 30, 1979, there were only eighty Federal spills costing \$100,000 or more for a total of \$56 million. In contrast, the far greater number of removals costing less than \$100,000 totaled \$20 million.¹⁰ From calendar years 1974 through 1979 alone there were over 2,700 Federal spills.¹¹ Table 7 summarized the annual statistics for Federal removals costing over \$100,000 and showing the time lag between the incident and collection. For example, five of the ten settlements or collections of 1972 and 1973 incidents were effected since fiscal year 1977. Few collections have been received for spills occurring since 1973. Given the increased experience of attorneys defending polluting clients, the relative successes in effecting reimbursement for 1973 major spills might not be repeated in subsequent years.

Congressional awareness of the problem

The fact that Congress intended the liability and administrative aspects of the law to be such that the fund would be self-sustaining is implicitly confirmed by frequent Congressional concern over the state of the fund. This concern is regularly expressed in appropriations hearings and was noted by the Senate Committee on Environment and Public Works in 1977 as follows:

The committee was particularly concerned with the soundness of the contingency fund. As a result of the 1970 act, \$35 million was appropriated to that fund. Most of that has now been depleted. While there are over \$26 million in pending claims and while liability payments and penalties have been returned to the fund, depletion has resulted from cleanup of unknown sources, cleanup where costs exceeded liability, and cleanup of spills where a defense to liability was raised. The new minimum liability for smaller oil tankers and

¹⁰Robert Cromling, "Pollution Incidents of \$100,000 or more from Inception through 30 September 1979," an unofficial tabulation (Washington, D.C.: 1980) (Handwritten).

¹¹U.S. Coast Guard, "Pollution Incident Reporting System, 1980.

TABLE 7
FEDERAL REMOVALS COSTING OVER \$100,000 WITH TOTAL COLLECTIONS
AT END OF FISCAL YEARS 1976 AND 1979^a
(Thousands of Dollars)

	Total Removals				Collected by 1976				Collected by 1979			
	No	Amt	Mean	Std Dev	No	Amt	Mean	Std Dev	No	Amt	Mean	Std Dev
1972	4	3958	990	1941	1	138	138	0	2	741	371	233
1973	10	4630	463	344	4	642	161	143	8	3307	413	286
1974	5	2692	538	519	1	5	5	0	1	5	5	0
1975	7	5355	765	833	0	—	—	—	1	2556	2556	0
1976	13	12575	967	2233	0	—	—	—	1	250	250	0
1972-1976	39	29210	749	1435	6	185	131	130	13	6859	528	643
1977	12	6781	565	848					1	1011	1011	0
1978	12	5202	434	678					1	1525	1525	0
1979	17	14231	842	1366					0			
1972-1976	80	55514	693	1241					15	9395	626	656

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SOURCE: U.S. Coast Guard, "Status of Oil Pollution Funds since 1972," memorandum 7300 from Chief, Accounting Division, to Chief, Congressional Affairs Staff, 7 September 1976. Robert Cromling, "Pollution Incidents of \$100,000 or More From Inception through 30 September 1979," an unofficial tabulation (Washington, D.C., 1980). (Handwritten).

^aMinor discrepancies exist between the above sources and with PIRS data, which was very incomplete on this subject.

the removal of the upper limit should make the fund more sound.¹²

Congressional actions in the 1977 amendment were an admirable incremental step toward fund solvency, but the reasons given for fund depletion are only the obvious ones with no mention made of the many other legal and administrative collection problems discussed in this study.

Little more light was shed on program problems or proposed solutions in front of Representative J. J. McFall's (D.-Ca.) Appropriations Committee on Transportation. Insofar as marine environmental protection is concerned, the annual hearings on Coast Guard appropriations by this committee have generally emphasized the response aspects of pollution control while glossing over liability and collection problems. More concern than usual with this latter area was expressed in the 1978 hearings. After a discussion of how most of the fund receivables are tied up in ten large cases, concern about fund recoveries was expressed in the following exchange between Congressman McFall and Coast Guard Rear Admiral Bursley:

Mr. McFall. Could we conclude that a large percentage of the money that we are expending for cleanup is now being returned to us?

Admiral Bursley. We are optimistic about the future, Mr. Chairman, It has been slow to start with because there was quite a bit of litigation testing the liability of the owners for these costs and just getting a feel for what the legislation meant. Since these cases have been resolved satisfactorily to the the Government, the resistance to payment has lessened and we are getting into sometimes very complex accounting questions as to whether what we say we spent is what we spent. The statute provides for our recovering actual costs, people are still litigating how reasonable those actual costs were, issues of that type.¹³

Presentations of gross financial data and superficial discussions, such as this one, are representative of the depth of data exchanged between the administration and

¹²U.S., Congress, Senate, Clean Water Act of 1977, S. Rept. 370 to Accompany S.1952, 95th Cong., 1st sess., 1977, p. 64.

¹³U.S., Congress, House, Committee on Appropriations, p. 373.

the legislature. Despite obvious knowledge of the impotence of either the law, the administration, or both, in the face of fund performance, neither myself nor the interviewed attorneys were aware of any in-depth probe of the elements governing Federal removal cost recovery.

Chapter Summary

It is reasonable to assume that the numerous inadequacies in the law and its administration contribute to the declining trend of polluter performed removal and increased Federal removal and removal costs, as was exemplified in this chapter. However, as was discussed in the introductory chapter, the effect of inefficiencies of law and administration are not the only determinants of the polluter's tendency to remove or not remove a discharge. This study does not, and probably cannot, measure the role of competing influences such as the goodwill of the polluter or his desire to temper the adverse public relations generated by a discharge by performing the removal. Therefore, any inferences made from available statistics cannot be conclusive.

V

CONCLUSION AND RECOMMENDATIONS

... The Federal government must somehow detect the issues and problems around which it organizes its efforts. It must sense the consequences of what it does. It must organize and transfer within its own system the data and directives on which policies and programs are based. It must undertake the bookkeeping tasks that go with taxation, regulation, and monitoring the state of the systems that are seen to be the legitimate business of government. Moreover, it must maintain this internal and external information system throughout shifts in its environment and in its central problems . . .

Donald A. Schon,
Beyond the Stable State,
(New York: Random House,
1971), p. 119-20.

Conclusion

Previous chapters have shown numerous legal and administrative inefficiencies that are, in effect, loopholes which enable the recalcitrant polluter to avoid incurring the full cost of removal. As he avoids removal costs the inevitable result is a higher cost Federal removal, for which the polluter may only be held partially liable. Many of the loopholes were drafted into the law while others may be attributed to bureaucratic sluggishness. Fortunately, up to the present, the polluter has voluntarily performed the great majority of pollution removals and the Federal pollution removal program area is small relative to many Federal programs. In fact it is small even though transaction and non-removal operating costs make the program considerably larger than is apparent from the pollution fund accounting data which may deceptively appear to reflect the Federal costs of removal. However, there appears to be a trend toward increased Federal removal

at higher costs and less removal performed by the polluter. Deficiencies of law and administration certainly contribute to this trend, although the extent of this contribution cannot be measured using existing program data. At any rate, the current state of the law and administrative practice can neither cause the polluter to voluntarily aspire to incur removal costs or effectively compel the polluter to perform removal. The result is that the "polluter pays principle", as is propounded by the program, must be primarily encouraged by other influences on the polluter, if at all. Thus there is a rather weak thread of support for the program that can be severed despite Federal policy.

Should the polluter be faced with economic hard times, or become more savvy in his perception of the law and its administration, or if non-program incentives for the polluter to perform removal are diminished in some way, the inevitable results are:

- increased Federal removal with associated inefficient transaction costs, and
- inequitable distribution of removal costs on a larger scale than now exists.

Why does a decade-old program continue in a track with administrators well aware of problems but doing little to analyze the problems through gathering proper data and then correcting problem areas? Why have no attempts been made to develop significant incentives for the polluter to perform removal, and disincentives for the polluter who foregoes this responsibility? How can this state of the program exist when all of the interviewed attorneys recognize numerous problem areas? Moreover, the attorneys themselves form the consensus that the program is so weak that they generally would advise a hypothetical polluter client not to accept removal responsibility, although most did emphasize that the circumstances of the case must be known before definite advice could be rendered. One wonders if the program administration has been lulled into complacency by the past good removal performance by many polluters? If so, the result is

something akin to the harsh analogy of the fox guarding the hen house, just as TOVALOP served to offer governments an easy solution to the problem of pollution liability notwithstanding the fact that protection from environmental harm is a field that is the "legitimate business of government". If there is any reason to be satisfied with the amount of polluter paid removals, most of the laurels must go not to the program but to those polluters who have acted responsibly, no matter what their motives.

The inertia of the program is not atypical of government programs. The established program is now in a state of stability and there is natural resistance to change. From a broad perspective, the program was forged into being in response to a sequence of events in the late 1960's that popularized the problem of pollution removal. When the idea was championed by powerful politicians like Senator Muskie, it was given the legitimacy and momentum necessary to break down traditional standards of liability. Being a new solution to a problem, there were few hard data available to fine tune the program; therefore, the law was shaped primarily by political forces. But once a program is implemented there is an opportunity to learn about its legal and economic impacts and its effectiveness, and then further tune the program. With some exceptions, such as the 1977 amendment to the third party exception, this fine tuning of the program has not occurred. Indeed the program has been and is expanding into the hazardous substance field but the mechanisms of legal liability and administrative practice remain substantially the same.

Massachusetts Institute of Technology Professor Donald Schon offers some interesting perceptions of the ability of government to adapt programs to changing situations or to act as a learning system, to "... learn to identify,

analyze, and solve . . .¹ problems. Dr. Schon notes that once new ideas are institutionalized they often no longer accurately reflect the state of affairs and they are slow to fade away.² He proposes that effective learning systems should reduce this lag so that present problems are being addressed. This clearly is not happening in the removal program and Dr. Schon characterizes this situation as being typical of institutionalized solutions to problems. Institutionalizing ideas tends to insulate the problem from undergoing further inquiry³ such as the inquiry of Senator Muskie's subcommittee. The inclination is to construct a "facade of progress and problem solving" by moving on to the next problems, thereby allowing past issues such as removal liability to stagnate and go out of fashion. Or there may be belief in the myth that the original solution was a once-and-for-all solution. The disparate functions of administrative units and the dearth of legal and administrative data on the collection process implicitly parallel Dr. Schon's contention that issues may stagnate simply by the government not knowing what is happening, even though it may have no political interest in feigning ignorance.⁴ The effect of these administrative pathologies and myths is to lock the government into the 1970 interpretation of the issue or to move to the next issue and leave older issues unresolved. The cumulative forces working against the organization becoming a learning system form an organizational trait that Dr. Schon calls "dynamic conservatism". Many individual behaviors also work against constructive change; however, that is beyond the macroscope of this study.

Therefore it is not unusual that this particular program does not

¹Donald A. Schon, Beyond the Stable State, (New York: Random House, 1971), p. 116.

²Ibid., p. 127.

³Ibid., p. 142.

⁴Ibid., p. 142.

aggressively seek to solve collection problems and strive for the efficiencies that accompany the polluter incurring removal costs. "Dynamic conservatism" is inherent in the bureaucracy.

This resistance to change must be an important consideration to offering recommendations for program improvement. The more drastic proposed changes are naturally more likely to be met with strong opposition. Some of my recommendations will no doubt be adventuresome and fit this category, but they are not offered arrogantly. The basic structure of the law and its administration is sound and only needs to be more attuned to its surroundings and to adjust itself accordingly. This does not call for drastic change followed by more problems inherent in any new program; rather, it calls for incremental changes directed at correcting specific problems. The final section of the study offers a few recommendations for increasing collection efficiency and reducing the removal burden of the Government by encouraging the polluter to perform removal. Many of the recommendations were suggested by the interviewees. Each recommendation can be considered independently and be adopted, modified, or discarded as is pertinent toward attaining the best combination of efficiency, equity, and fiscal responsibility in program management. The ultimate goal is to perform the Government's fiduciary duty to all United States citizens.

Recommendations

Amending the law

Amending the law may be the most difficult type of program change to accomplish — especially since most improvements to the effectiveness of the law will be detrimental to polluting industries and arouse great opposition. However, there is no need to substantially alter the framework of liability in order to close some major legal loopholes.

**Amend "U.S. Government negligence"
exception liability**

Section 1321(f)(1)(c) of the codified law permits the polluter to avoid removal liability if he can prove that the discharge was caused by negligence on the part of the United States Government. This provision should only be applicable if the Government is grossly negligent. Of particular concern are those instances when the Government must respond to an emergency situation and the situation becomes worse. In an example given by one attorney, a burning pleasure craft sank as the Coast Guard put out a fire.⁵ It was argued that the resulting fuel discharge was caused by the U.S. Government, therefore, the polluter should not be held liable. When the Government is forced to respond to a casualty, allegations of Government negligence in the courtroom, or in a settlement, should be subject to the stringent test of gross negligence.

Reverse the burden of collection

Admittedly this is a very adventuresome proposal. In the current program, if a polluter does not undertake removal the Government quickly suffers the removal cost and recovers the cost with considerable difficulty. Perhaps the removal cost issue would be sped through the courts if, after a discharge, the Government either became the beneficiary of the polluter's pollution insurance for the amount of the removal or could otherwise assert a lien on a polluter's assets up to the limitations of liability. The procedures for taking these actions would undoubtedly have to be carefully drafted and would be scrutinized in order to eliminate their potential to deprive a party of substantive or procedural due process of law.⁶

⁵Interview (telephone) with LT D.L. Brannon, Legal Officer, U.S. Coast Guard Seventh District, Miami, FL, 22 May 1980.

⁶The Fifth Amendment to the Constitution safeguards due process. To meet the requirements of substantive due process legislation must be reasonably oriented toward the furtherance of a legitimate government objective. Procedural

Increase liability to full cost of Federal removal

The polluter who refuses to accept cleanup responsibility now enjoys a liability limited to "actual" removal costs rather than the full costs of a Federal removal which includes various transaction costs plus collection costs. The law should expand this liability to reflect all of these costs. It is not advisable that administrative costs necessarily be itemized as this would be an additional accounting expense. Rather, these expenses could be accounted for by levying a fixed surcharge on the removal costs. For example, the surcharge could be 10 percent for any Federal removal and an additional percentage if certain collection actions need to be taken. This added liability would certainly be an incentive for a polluter to voluntarily clean up or to promptly reimburse the cost of a Federal removal.

Tie liability limits to inflation

As long as it is the will of Congress to limit liability, this limitation should at least conform to the changing financial scene without having to rely constantly on Congressional action to do so. During the program's lifetime inflation has run rampant and the polluter's liability is effectively reduced. The amount of liability is important because the polluter has less incentive to perform a cleanup when it appears that removal cost may exceed limitations. Parity could be maintained by periodically multiplying the fixed limits of liability by a multiplier based on acceptable indices of inflation.

Adjust prejudgement interest

The commercial interest rates of recent years have exceeded the modest interest (about 6 percent) that the courts have awarded to Government recoveries of removal costs. This situation is clearly a disincentive for the polluter to pay

due process requires the notice and right to a fair hearing be accorded prior to depriving a person of property of liberty. Steven H. Gifis, Law Dictionary, (Woodbury, N.Y.:Barron's, 1975), p. 65-66.

for removal. It could easily be remedied by basing the prejudgement interest rate on the commercial lending rate available to the polluter. Arguments that the Government's cost of borrowing money is less than the commercial rate are not relevant because the real issue is that the liable polluter is essentially holding a loan for the removal amount.

Changing program administration

Use commercial credit or collection bureaus

Compelling collection by listing a debit with a commercial credit bureau deserves special note because this method is authorized by the revised Federal Collection Standards, but it has not yet been used. This concept could be taken one step further by using collection agencies for debt collection. Collection agencies normally work for a large percentage of what is collected; however, this is better than collecting none of a debt that does not warrant the expense of more administrative or legal efforts. Use of these methods is certainly an additional administrative burden. Perhaps the most effective use of commercial collection agencies is as a threat in one or more of the progressively stronger demand letters. This and other methods have limited application and should be weighed against the circumstances of the case and the cost of their use. At any rate, Government attorneys should be capable of deftly using available collection tools and developing new methods of collection.

Use promissory notes

The complexity of prosecuting a case to recover removal costs and preserving evidence encourages the use of simpler methods whenever they are applicable. The promissory note is one method to simplify collection when the polluter wants to pay removal costs but does not have the money at hand. If this polluter signs a note agreeing to a payment schedule, subsequent court actions will be based on the simple evidence of the note rather than the facts surrounding the discharge of pollution. The program administration should encourage the use of

this legal tool and other pertinent tools that may effect collection.

Provide affirmative program leadership

The pollution fund should have a spokesman who is responsible for all facets of program administration having a direct bearing on the extent to which the polluter is held to his liability. These facets include the quality of the training of personnel to collect evidence, monitoring the fund level and acting appropriately to review and change district collection procedures, maintaining a working relationship with the Justice Department, and proposing needed changes to the law. This person should have the necessary authority to coordinate the efforts of the many different offices participating in the collection process. This inspector general type of position could be created from an existing Headquarters office.

**Increase authority of district legal offices
and Claims and Litigation Division**

First, I recommend that the settlement authority of the district legal offices be increased to the maximum amount delegated to the Coast Guard. In chapter three it was noted that the collection settlement authority of district legal offices is limited to only \$5,000. Perhaps the \$5,000 limit was considered adequate a decade ago but now it is an archaic limit and can only cause an imbalance in the collection system. Inflation is the principle root of the problem. As inflation results in more and more Federal removals exceeding \$5,000, district legal's settlement authority decreases, and more cases must be forwarded to the Claims and Litigation Division. Of course this same phenomenon is faced by the Chief Counsel and Claims and Litigation who are also limited in settlement authority. An increase in the district's limit would allow more collection actions to be resolved at that local level thereby decreasing the complexity of the collection process.

There would also be a corresponding decrease in the number of collections handled by Claims and Litigation. This decrease would permit that office to spend

more time performing the administrative functions befitting a Headquarters office and concentrating on more difficult collections. Furthermore, since the collection process often becomes a complicated legal problem, perhaps the Claims and Litigation Division should be the home of the previously discussed "inspector general".

Organize and expand data bases

It is imperative that the program receive feedback of relevant data if it is to be a learning system capable of responding to changes in the program's environment. Data should not simply be a passive indicator of program performance, they should also be an evaluation and change tool that may serve as powerful evidence to counter the normal resistance to change that Dr. Schon characterized as "dynamic conservatism". There is no need to overhaul present data collection systems. Instead, there are many incremental changes that should be considered and implemented as is appropriate.

A basic improvement would be to tie together all of the numbers by which each Federal spill is now known. The least desirable way to do this is to simply cross reference the numbers. A preferable method would be to permit each office to refer to a case by the same number and, if necessary, supplement that number with a code pertinent to the office.

Data elements that permit assessment of important legal and administrative aspects of the program should be maintained. Examples of key legal elements include the amount of the polluter's limitation of liability, types of defenses argued and subsequently accepted by the courts, and other reasons for collecting less than the actual cost of a Federal removal. Financial data should attempt to reflect the transaction costs of a Federal spill in order to support measures to reduce these costs or to correspondingly adjust the polluter's liability. Of course, more data are needed on the procedural elements of

collection including the administrative route that a case follows and the time span between administrative steps. This data could be maintained in many ways. Perhaps the simplest method is to write pertinent data onto the case file envelope thereby at least saving the effort of searching the entire case for pieces of data. Better data banks will be computerized and permit retrieval and statistical analysis of specific combinations of data.

If data are computerized, the PIRS number is the obvious choice of the existing numbers for identifying incidents. PIRS now offers the most comprehensive discharge data. Additional legal and financial data could be encoded into PIRS and dated through terminals from the appropriate offices. By having PIRS also serve as the "bookkeeping" system for those offices, the reliability and validity of the data would be improved. Furthermore, the use of PIRS would readily permit correlating the more comprehensive Federal spill data with other incidents, including those that were removed by the polluter.

Expedite the collection process

The "devilishly slow" collection process is the direct or indirect root of many partial removal cost recoveries. It is the obvious cause of no recovery when the statute of limitations has run out. Procedural sluggishness is often responsible in a less conspicuous way when cases are lost or settled for lesser amounts because the evidence has become stale, or when the prejudgement interest meter starts running late due to late billings. A prolonged collection process could also drive up the costs of collection. These problems can only be addressed by trimming off those elements of the collection process that consume time and offer little contribution to the goal of a successful collection. With the knowledge that a thorough study must be made of each district's procedure, I will characterize some problem areas.

A general policy should be to move the collection effort to the

administrative areas that can exert the most pressure to effect early payment. Generally this means moving the case to the attorney who has the authority to settle that case — or, in the case of a recalcitrant polluter, to prosecute the case. Of course, if the comptroller or marine environmental protection can effect collection, that is fine; however, there should be no reason for these offices to sit on a case or idly wait for responses to collection letters. It is best if lower offices in the collection process are skipped altogether. If this cannot be done, they can perform the routine procedural aspect of the collection process and prepare a procedural step for the next level. For example, in a typical collection the finance division is finished with its collection job when it sends the first billing. Then, the case sits for a month or more if a response is not forthcoming. Instead, finance should prepare the first demand letter and a follow up demand letter. The first letter is signed by the comptroller and the case is immediately forwarded to the next procedural step, for example, to the legal officer. If no response is received in a short time, i.e., two weeks, the legal office sends the already prepared followup letter even if an attorney did not yet have an opportunity to review the case. Similarly, some district legal offices draft the collection letter for U.S. Attorney's signature so that the necessary routine procedural work is being performed immediately even if the attorney could not review the case promptly.

Going hand-in-hand with rapidly performing routine procedural steps is to decrease the "dead time" between demand letters, especially since four letters are now required rather than three. Ten-day or two-week intervals may seem harsh but this is more than enough time for the polluter to either respond to the letter or to ask for a reasonable grace period by telephone. Short intervals will be indicative of an aggressive collection action and an uncharacteristically dynamic bureaucracy. This is especially so if the recalcitrant polluter sees from the

letters that the case has gone from the hands of the comptroller, to marine environmental protection, to the district legal officer, to the U.S. Attorney for the filing of a lawsuit in only two months! (rather than three years - ho hum).

Another step to speed up the system is for all districts to have prenegotiated contracts with cleanup contractors thereby reducing post removal negotiations. The Coast Guard should continue to encourage these contracts.

Large cases should be identified and receive early attention from district legal. As was expressed by several of the attorneys, this legal review should not interfere with the autonomy of the OSC or influence response efforts in any way. Unless otherwise requested, the legal office's sole concern should be the sufficiency of the evidence to recover Federal cleanup costs in court. Depending on the circumstances of the case, an attorney might coordinate the gathering of evidence, assist in gathering evidence, or simply review the evidence that has been gathered. As a former investigating officer, I observed how quickly the attorneys representing industry arrived at the scene of the casualty and began gathering evidence in support of their client. The petty officers who investigate pollution incidents often perform excellent investigations. However, judicial proceedings are on a higher, more rigorous plane than most administrative hearings or routine investigations. If the Government must prosecute a case involving tens of thousands of dollars, it could often be at a serious disadvantage if a Government attorney's initial review of the evidence is a year or more after the incident. If there is a shortage of attorneys, efforts can at least be made to review the relatively small number of large cases which form most of the pollution fund expenditures.

Summary of recommendations

The preceding recommendations are simplistic in that attempts to implement them will undoubtedly cause other problems to surface. With this in

mind, I recommend that the simpler administrative changes be considered first. They offer the most rapid and least controversial means to infuse the program with new vigor. Therefore, minor procedural changes that can be implemented with minimal red tape should be considered immediately.

Second priority should be assigned to the more complicated administrative changes. Foremost in this category is the recommendation to modify those information gathering and analysis aspects of the program that are required to make the program a learning system. A hastily planned information gathering system can easily become overloaded, thereby making data analysis difficult or impossible. Careful analysis is required to identify selective pieces of data required for program evaluation—data which may be collected and maintained in the least complicated manner.

The recommended changes in the law constitute the lowest priority because of the limited influence that can be exerted by the Coast Guard on Congress. Nevertheless, as the principal program administrator, the Coast Guard is responsible for providing program feedback to Congress. This feedback should emphasize problems with enforcement of the law — especially where provisions of the law conflict with each other.

In summary, this paper has analyzed the characteristics of a mature administrative program and found it to be stale and mired in bureaucratic procedure. The recommendations are intended to allow the Coast Guard to sense the consequences of the law and the program that it administers. Furthermore, the Coast Guard must continually strive to eliminate program weaknesses. Only then will the program become a "learning system" that, by incremental changes, can become more responsive to its environment and to the needs of the American people.

APPENDIX 1

U.S. Code Annotated, vol. 33, sec. 1321 (1978).

§ 1321. Oil and hazardous substance liability

Definitions

(a) For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

(8) "remove" or "removal" refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section;

(15) "inland oil barge" means a non-self-propelled vessel carrying oil in bulk as cargo and certificated to operate only in the inland waters of the United States, while operating in such waters;

(16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; determination of removability; liability; penalties

(b)(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B)(i) The Administrator shall include in any designation under subparagraph (A) of this subsection a determination whether any such designated hazardous substance can actually be removed.

(ii) The owner or operator of any vessel, onshore facility, or offshore facility from which there is discharged during the two-year period beginning on October 18, 1972, any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided under subsection (f) of this section, as appropriate, to the United States for a civil penalty per discharge established by the Administrator based on toxicity.

degradability, and dispersal characteristics of such substance, in an amount not to exceed \$50,000, except that where the United States can show that such discharge was a result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States for a civil penalty in such amount as the Administrator shall establish, based upon the toxicity, degradability, and dispersal characteristics of such substance.

Under the provisions of the foregoing, and subject to clause (ii) of this subparagraph, the owner or operator of any vessel, onshore facility, or offshore facility, from which there is discharged any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided in subsection (f) of this section, to the United States for either one or the other of the following penalties, the determination of which shall be in the discretion of the Administrator:

(aa) a penalty in such amount as the Administrator shall establish, based on the toxicity, degradability, and dispersal characteristics of the substance, but not less than \$500 nor more than \$5,000; or

(bb) a penalty determined by the number of units discharged multiplied by the amount established for such unit under clause (iv) of this subparagraph, but such penalty shall not be more than \$5,000,000 in the case of a discharge from a vessel and \$500,000 in the case of a discharge from an onshore or offshore facility.

(iv) The Administrator shall establish by regulation, for each hazardous substance designated under subparagraph (A) of this paragraph, and within 180 days of the date of such designation, a unit of measurement based upon the usual trade practice and, for the purpose of determining the penalty under clause (iii)(bb) of this subparagraph, shall establish for each such unit a fixed monetary amount which shall be not less than \$100 nor more than _____ unit. He shall establish such fixed amount based on the toxicity, degradability, and dispersal characteristics of the substance.

(v) In addition to establishing a penalty for the discharge of a hazardous substance determined not to be removable pursuant to clauses (ii) through (iv) of this subparagraph, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management au-

thority of the United States (including resources under the Fishery Conservation and Management Act of 1976), where permitted under the International Convention for the Prevention of Pollution of the sea by Oil, 1964, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation, to be issued as soon as possible after October 18, 1972, determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than \$5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) who is otherwise subject to the jurisdiction of the United States, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than \$5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the viola-

tion, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

**Removal of discharged oil or hazardous substances;
National Contingency Plan**

(c)(1) Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976) the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous substance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

Maritime disaster discharges

(d) Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection or under the Intervention on the High Seas Act (or the convention defined in section 2(3) thereof) shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil or hazardous substance.

Judicial relief

(e) In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and

private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

Liability for actual costs of removal

(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge \$125 per gross ton of such barge, or \$125,000, whichever is greater, and in the case of any other vessel, \$150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, \$250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed \$50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs.

The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed \$50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

Third party liability

(g) Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such dis-

charge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge \$125 per gross ton of such barge, or \$125,000, whichever is greater, and in the case of any other vessel, \$150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, \$250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Rights against third parties who caused or contributed to discharge

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

Recovery of removal costs

(i)(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act, or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

Regulations; penalty

(j)(1) Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than \$5,000 for each such violation. This paragraph shall not apply to any owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of subsection (b) of this section unless such owner, operator, or person in charge is otherwise subject to the jurisdiction of the United States. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall

have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

Authorization of appropriations

(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury such sums as may be necessary to maintain such fund at a level of \$35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

Administration

(l) The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

Boarding and inspection of vessels; arrest; execution of warrants or other process

(m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

Jurisdiction

(n) The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i)(1) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal

Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected

(o)(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

Financial responsibility

(p)(1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of, in the case of an inland oil barge \$125 per gross ton of such barge, or \$125,000, whichever is greater, and in the case of any other vessel, \$150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, \$250,000), whichever is greater, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after October 18, 1972, with respect to hazardous substances. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after October

18, 1972. Regulations necessary to implement this subsection shall be issued within six months after October 18, 1972.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issued thereunder, shall be subject to a fine of not more than \$10,000.

(5) The Secretary of the Treasury may refuse the clearance required by section 91 of Title 46 to any vessel subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(6) The Secretary of the Department in which the Coast Guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

**Establishment of maximum limit of liability with
respect to onshore or offshore facilities**

(q) The President is authorized to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under subsections (f)(2) and (3) of this section of less than \$50,000,000, but not less than \$8,000,000.

**Liability limitations not to limit liability under
other legislation**

(r) Nothing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974.

June 30, 1948, c. 758, Title III, § 311, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 862, and amended Dec. 28, 1973, Pub.L. 93-207, § 1(4), 87 Stat. 906; Dec. 27, 1977, Pub.L. 95-217, §§ 57, 58(a)-(g), (i), (k)-(m), 91 Stat. 1593-1596.

APPENDIX 2

Code of Federal Regulations, title 33, part 153, subpart D (1979).

Subpart D—Administration of the Pollution Fund

§ 153.401 Purpose.

This subpart prescribes policies, procedures, and reporting requirements for the payment from and deposit into the Fund established pursuant to section 311(k) of the Act.

§ 153.403 Applicability.

The provisions of this subpart apply to—

(a) Each Federal and State agency that desires reimbursement from the Fund for costs incurred during a removal activity; and

(b) The owner or operator of the vessel or onshore or offshore facility from which a discharge occurs that requires Federal removal activity.

§ 153.405 Liability to the pollution fund.

The owner or operator of the vessel or onshore or offshore facility from which a discharge occurs that requires Federal removal activity is liable to the pollution fund for the actual costs of Federal and State agencies, including the employment and use of personnel and equipment, not to exceed the limits established by sections 311(f) and (g) of the Act.

§ 153.407 Payments or reimbursement from the pollution fund.

(a) The following costs incurred during performance of a Phase III or IV activity, defined by the National Contingency Plan, as authorized by the appropriate OSC under the authority of section 311(c) of the Act and of the provisions of the National Contingency Plan, or during the removal or elimination of threats of pollution hazards from discharges, or imminent discharges, of oil or hazardous substances, and the removal and destruction of vessels, as authorized by the appropriate AC under the authority of section 311(d) of the Act are reimbursable to Federal and State agencies:

(1) Costs found to be reasonable by the Coast Guard incurred by government industrial type facilities, including charges for overhead in accord-

ance with the agency's industrial accounting system.

(2) Actual costs for which an agency is required or authorized by any law to obtain full reimbursement.

(3) Costs found to be reasonable by the Coast Guard incurred as a result of removal activity that are not ordinarily funded by an agency's regular appropriations and that are not incurred during normal operations. These costs include, but are not limited to, the following:

(i) Travel (transportation and per diem) specifically requested of the agency by the On-Scene Coordinator.

(ii) Overtime for civilian personnel specifically requested of the agency by the On-Scene Coordinator.

(iii) Incremental operating costs for vessels, aircraft, vehicles, and equipment incurred in connection with the removal activity.

(iv) Supplies, materials, and equipment procured for the specific removal activity and fully expended during the removal activity.

(v) Lease or rental of equipment for the specific removal activity.

(vi) Contract costs for the specific removal activity.

(4) Claims payable under Part 25, Subpart J of this title.

(b) The District Commander may authorize the direct payment of the costs found to be reasonable under paragraph (a)(3) of this section.

(c) The Pollution Fund is not available to pay any foreign, Federal, State or local government or agency for the payment or reimbursement of its costs incurred in the removal of oil or hazardous substances discharged from a vessel or facility that it owns or operates.

NOTE: Federal procurement procedures governing contracts to purchase property and services apply to costs incurred as a result of removal activity. Where the public exigency will not permit the delay incident to advertising, purchases and contracts are negotiated pursuant to 10 U.S.C. 2304(a)(2) or 41 U.S.C. 252(c)(2), as applicable.

§ 153.411 Procedures for payment of judgments.

An owner or operator of a vessel or an onshore or offshore facility who obtains a judgment against the United States under section 311(i) of the Act may have the judgment satisfied by requesting payment of the judgment in writing from the Commandant (G-L), 400 7th Street SW., Washington, D.C. 20590. This request must be accompanied by a copy of the judgment and must designate to whom payment should be made.

§ 153.413 Deposit of money into the fund.

Any person liable for the payment of the following shall remit payment by check or postal money order, payable to the U.S. Coast Guard, to the cognizant District Commander, or to the Commandant for deposit into the Pollution Fund as prescribed in section 311(k) of the Act:

(a) A fine or penalty imposed, assessed, or compromised under section 311 of the Act, including the proceeds of a bond or other surety obtained pursuant to section 311(b)(6).

(b) A claim asserted by the cognizant District Commander for costs recoverable under sections 311 (f) and (g) of the Act.

(c) A judgment obtained by the United States for costs recoverable under sections 311 (f) and (g) of the Act.

§ 153.415 OSC and AC reports.

As soon as practicable after completion of an action authorized under section 311 (c) or (d) of the Act, the OSC or AC submits a report to the cognizant District Commander that must include—

(a) Names of agencies and contractors authorized to participate in the action;

(b) A general description of the function performed by each participating agency and contractor;

(c) An estimate of the cost of each function performed by each participating agency and contractor; and

(d) A copy of contracts, memoranda, or other documents pertaining to the functions performed by the participating agencies and contractors.

§ 153.417 Reimbursement for actions under section 311(c) of the Act.

(a) Each Federal or State agency requesting reimbursement for an action authorized under section 311(c) of the Act must, within 60 days after comple-

tion of the action, submit to the cognizant District Commander, through the OSC for review and certification required in paragraph (b) of this section, lists, accompanied by supporting accounting data, itemizing actual costs incurred.

(b) Requests for reimbursement submitted by Federal and State agencies are reviewed by the OSC to ensure that the costs for which reimbursement is being sought were authorized as Phase III and IV removal actions and must have one of the following certifications by the OSC, as appropriate:

(1) I certify that the actions for which reimbursement is being requested in the attached statements were authorized by me as Phase III and IV removal actions, and reasonable costs related thereto are proper for payment from the Pollution Fund.

(Signature)
OSC

(Incident title)

(Pollution incident
project number)

(2) I certify that, except as noted below, the actions for which reimbursement is being requested in the attached statements were authorized by me as Phase III and IV removal actions, and reasonable costs related thereto are proper for payment from the Pollution Fund. The following actions were not authorized by me and are not subject to reimbursement from the Pollution Fund:

(Signature)
OSC

(Incident title)

(Pollution incident
project number)

§ 153.119 Reimbursement for actions under 311(d) of the Act.

(a) Each Federal agency requesting reimbursement for an action authorized under section 311(d) of the Act must, within 60 days after completion of the action, submit to the cognizant District Commander, through the AC for review and certification required in paragraph (b) of this section, lists, ac-

companied by supporting accounting data, itemizing actual costs incurred.

(b) Requests for reimbursement submitted by Federal agencies are reviewed by the AC to ensure that the costs for which reimbursement is being sought were authorized under section 311(d) of the Act and must have one of the following certifications by the AC, as appropriate:

(1) I certify that the actions for which reimbursement is being requested in the attached statements were authorized by me as removal actions under section 311(d) of the Act and reasonable costs related thereto are proper for payment from the Pollution Fund.

(Signature)

AC

(Incident title)

(Pollution incident
project number)

(2) I certify that, except as noted below, the actions for which reimbursement is being requested in the attached statements were authorized by me as removal actions under section 311(d) of the Act, and reasonable costs related thereto are proper for payment from the Pollution Fund. The following actions were not authorized by me and are not subject to reimbursement from the Pollution Fund:

(Signature)

AC

(Incident title)

(Pollution incident
project number)

APPENDIX 3

Code of Federal Regulations, title 4, parts 101-105 (1980).

CHAPTER II—FEDERAL CLAIMS COLLECTION STANDARDS (GENERAL ACCOUNTING OFFICE—DEPARTMENT OF JUSTICE)

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PART 101—SCOPE OF STANDARDS

Sec.

- 101.1 Prescription of standards.
- 101.2 Omissions not a defense.
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AUTHORITY: Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

SOURCE: 51 FR 13381, Oct. 15, 1966, unless otherwise noted.

§ 101.1 Prescription of standards.

The regulations in this chapter, issued jointly by the Comptroller General of the United States and the Attorney General of the United States under section 3 of the Federal Claims Collection Act of 1966, 80 Stat. 309, prescribe standards for the administrative collection, compromise, termination of agency collection, and the referral to the General Accounting Office, and to the Department of Justice for litigation, of civil claims by the Federal Government for money or property. Additional guidance is contained in Title 4 of the General Accounting Office Manual for Guidance of Federal Agencies. Regulations prescribed by the head of an agency pursuant to section 3 of the Federal Claims Collection Act of 1966 will be reviewed by the General Accounting Office as a part of its audit of the agency's activities.

(44 FR 22701, Apr. 17, 1979)

§ 101.2 Omissions not a defense.

The standards set forth in this chapter shall apply to the administrative handling of civil claims of the Federal Government for money or property but the failure of an agency to comply with any provision of this chapter shall not be available as a defense to any debtor.

§ 101.3 Fraud, antitrust, and tax claims excluded.

The standards set forth in this chapter do not apply to the handling of any claim as to which there is an indi-

cation of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, or to any claim based in whole or in part on conduct in violation of the antitrust laws. Only the Department of Justice has authority to compromise or terminate collection action on such claims. However, matters submitted to the Department of Justice for consideration without compliance with the regulations in this chapter because there is an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, may be returned to the agency forwarding them for further handling in accordance with the regulations in this chapter if it is determined that action based upon the alleged fraud, false claim, or misrepresentation is not warranted. Tax claims, as to which differing exemptions, administrative consideration, enforcement considerations, and statutes apply, are also excluded from the coverage of this chapter.

§ 101.4 Compromise, waiver, or disposition under other statutes not precluded.

Nothing contained in this chapter is intended to preclude agency disposition of any claim under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, providing for the compromise, termination of collection action, or waiver in whole or in part of such a claim. See, e.g., "The Federal Medical Care Recovery Act," 76 Stat. 593, 42 U.S.C. 2651, et seq., and applicable regulations, 28 CFR 43.1, et seq. The standards set forth in this chapter should be followed in the disposition of civil claims by the Federal Government by compromise or termination of collection action (other than by waiver pursuant to statutory authority) under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, to the extent such other statutes or authorized regulations issued pursuant thereto do not establish standards governing such matters.

§ 101.5 Conversion claims.

The instructions contained in this chapter are directed primarily to the recovery of money on behalf of the Government and the circumstances in which Government claims may be disposed of for less than the full amount claimed. Nothing contained in this chapter is intended, however, to deter an agency from demanding the return of specific property or from demanding, in the alternative, either the return of property or the payment of its value.

§ 101.6 Subdivision of claims not authorized.

A debtor's liability arising from a particular transaction or contract shall be considered as a single claim in determining whether the claim is one of less than \$20,000, exclusive of interest, for the purpose of compromise or termination of collection action. Such a claim may not be subdivided to avoid the monetary ceiling established by the Federal Claims Collection Act of 1966, 80 Stat. 308.

§ 101.7 Required administrative proceedings.

Nothing contained in this chapter is intended to require an agency to omit or foreclose administrative proceedings required by contract or by law.

§ 101.8 Referral for litigation.

As used in this chapter referral for litigation means referral to the Department of Justice for appropriate legal proceedings, unless the agency concerned has statutory authority for handling its own litigation.

PART 102—STANDARDS FOR THE ADMINISTRATIVE COLLECTION OF CLAIMS

Sec.

- 102.1 Aggressive agency collection action.
- 102.2 Demand for payment.
- 102.3 Collection by offset.
- 102.4 Reporting delinquent debts to commercial credit bureaus.
- 102.5 Personal interview with debtor.
- 102.6 Contact with debtor's employing agency.
- 102.7 Suspension or revocation of license or eligibility.

Sec.

- 102.8 Liquidation of collateral.
- 102.9 Collection in installments.
- 102.10 Exploration of compromise.
- 102.11 Interest.
- 102.12 Analysis of costs.
- 102.13 Documentation of administrative collection action.
- 102.14 Automation.
- 102.15 Prevention of overpayments, delinquencies, and defaults.
- 102.16 Additional administrative collection action.

AUTHORITY: Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

§ 102.1 Aggressive agency collection action.

The head of an agency or his designee shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money or property arising out of the activities of, or referred to, his agency in accordance with the standards set forth in this chapter. However, nothing contained in this chapter is intended to require the General Accounting Office or the Department of Justice to duplicate collection actions previously undertaken by any other agency.

(31 FR 13381, Oct. 15, 1966)

§ 102.2 Demand for payment.

Appropriate written demands shall be made upon a debtor of the United States in terms which inform the debtor of the consequences of his failure to cooperate. In the initial notification, the debtor should be informed of the basis for the indebtedness, the applicable requirements or policies for charging interest and reporting delinquent debts to commercial credit bureaus, and the date by which the payment is to be made (date due). The date due should be specified and, normally, should be not more than 30 days from the date of the initial notification. Three progressively stronger written demands at not more than 30-day intervals will normally be made unless a response to the first or second demand indicates that further demand would be futile and the debtor's response does not require rebuttal. Further exceptions may be made where it is necessary to protect the Government's interests (e.g., the statute of

limitations (28 U.S.C. 2415)). Agencies should respond promptly to communications from the debtor. Agencies should advise debtors who dispute the debt to furnish available evidence to support their contentions.

(44 FR 22702, Apr. 17, 1979)

§ 102.3 Collection by offset.

Collections by offset will be undertaken administratively on claims which are liquidated or certain in amount in every instance in which this is feasible. Collections by offset from persons receiving pay or compensation from the Federal Government shall be effected over a period not greater than the period during which such pay or compensation is to be received. See 5 U.S.C. 5514. Collection by offset against a judgment obtained by the debtor against the United States shall be accomplished in accordance with the Act of March 3, 1875, 18 Stat. 481, as amended, 31 U.S.C. 227. Appropriate use should be made of the cooperative efforts of other agencies in effecting collections by offset, including utilization of the Army Holdup List, and all agencies are enjoined to cooperate in this endeavor.

(31 FR 13382, Oct. 15, 1966)

§ 102.4 Reporting delinquent debts to commercial credit bureaus.

Agencies shall develop and implement procedures for reporting delinquent debts to commercial credit bureaus. In the absence of a different rule prescribed by statute, contract, or regulation, a debt is considered delinquent if not paid by the date due specified in the initial notification, unless satisfactory payment arrangements are made by the date due. Agency procedures for reporting delinquent debts to credit bureaus must give due regard to compliance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, which includes the following requirements: (a) Promulgate a "routine use" for the disclosure; (b) keep an accounting for disclosures and make them available to the debtor; (c) provide the credit bureaus with corrections and notations of disagreement by the debtor; and (d) make reasonable efforts to assure that the information to be re-

ported is accurate, complete, timely, and relevant. Prior to exercising the option of reporting delinquent debts to commercial credit bureaus, agencies should send a demand letter advising the debtor that such reporting will take place within a specified period of time unless the debtor makes satisfactory payment arrangements or demonstrates some basis on which the debt is legitimately disputed.

(44 FR 22702, Apr. 17, 1979)

§ 102.5 Personal interview with debtor.

Agencies will undertake personal interviews with their debtors when this is feasible, having regard for the amounts involved and the proximity of agency representatives to such debtors.

(31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979)

§ 102.6 Contact with debtor's employing agency.

When a debtor is employed by the Federal Government or is a member of the military establishment or the Coast Guard, and collection by offset cannot be accomplished in accordance with 5 U.S.C. 5514, the employing agency will be contacted for the purpose of arranging with the debtor for payment of the indebtedness by allotment or otherwise in accordance with section 206 of Executive Order 11222 of May 8, 1965, 3 CFR, 1965 Supp., p. 130 (30 FR 6469).

(31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979)

§ 102.7 Suspension or revocation of license or eligibility.

Agencies seeking the collection of statutory penalties, forfeitures, or debts provided for as an enforcement aid or for compelling compliance will give serious consideration to the suspension or revocation of licenses or other privileges for any inexcusable, prolonged or repeated failure of a debtor to pay such a claim and the debtor will be so advised. Any agency making, guaranteeing, insuring, acquiring, or participating in loans will give serious consideration to suspending or disqualifying any lender, contractor, broker, borrower or other

debtor from doing further business with it or engaging in programs sponsored by it if such a debtor fails to pay its debts to the Government within a reasonable time and the debtor will be so advised. The failure of any surety to honor its obligations in accordance with 6 U.S.C. 11 is to be reported to the Treasury Department at once. Notification that a surety's certificate of authority to do business with the Federal Government has been revoked or forfeited by the Treasury Department will be forwarded by that Department to all interested agencies.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979]

§ 102.8 Liquidation of collateral.

Agencies holding security or collateral which may be liquidated and the proceeds applied on debts due it through the exercise of a power of sale in the security instrument or a non-judicial foreclosure should do so by such procedures if the debtor fails to pay his debt within a reasonable time after demand, unless the cost of disposing of the collateral will be disproportionate to its value or special circumstances require judicial foreclosure. Collection from other sources, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety or insurance concern unless such action is expressly required by statute or contract.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979]

§ 102.9 Collection in installments.

Claims, with interest in accordance with § 102.10 should be collected in full in one lump sum whenever this is possible. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments. The size and frequency of such installment payments should bear a reasonable relation to the size of the debt and the debtor's ability to pay. If possible the installment payments should be sufficient in size and frequency to liquidate the Government's claim in not more than 3 years. Installment payments of less than \$10 per month should be accepted in only the most

unusual circumstances. An agency holding an unsecured claim for administrative collection should attempt to obtain an executed confess-judgment note, comparable to the Department of Justice form USA-70a, from a debtor when the total amount of the deferred installments will exceed \$750. Such notes may be sought when an unsecured obligation of a lesser amount is involved. Security for deferred payments, other than a confess-judgment note, may be accepted in appropriate cases. An agency may accept installment payments notwithstanding the refusal of a debtor to execute a confess-judgment note or to give other security, at the agency's option.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979]

§ 102.10 Exploration of compromise.

Agencies will attempt to effect compromises (preferably during the course of personal interviews), of claims of \$20,000 or less exclusive of interest, in accordance with the standards set forth in Part 103 of this chapter in all cases in which it can be ascertained that the debtor's financial ability will not permit payment of the claim in full, or in which the litigative risks or the costs of litigation dictate such action.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979]

§ 102.11 Interest.

In the absence of a different rule prescribed by statute, contract, or regulation, interest should be charged on delinquent debts and debts being paid in installments in conformity with the Treasury Fiscal Requirements Manual. When a debt is paid in installments, the installment payments will first be applied to the payment of accrued interest and then to principal, in accordance with the so-called "U.S. Rule," unless a different rule is prescribed by statute, contract, or regulation. Prejudgment interest should not be demanded or collected on civil penalty and forfeiture claims unless the statute under which the claim arises authorizes the collection of such interest. See *Rodgers v. United States*, 332 U.S. 371.

[44 FR 22702, Apr. 17, 1979]

§ 102.12 Analysis of costs.

Agency collection procedures should provide for periodic comparison of costs incurred and amounts collected. Data on costs and corresponding recovery rates for debts of different types and in various dollar ranges should be used to compare the cost effectiveness of alternative collection techniques, establish guidelines with respect to the points at which costs of further collection efforts are likely to exceed recoveries, assist in evaluating offers in compromise, and establish minimum debt amounts below which collection efforts need not be taken. Cost and recovery data should also be useful in justifying adequate resources for an effective collection program.

[44 FR 22702, Apr. 17, 1979]

§ 102.13 Documentation of administrative collection action.

All administrative collection action should be documented and the bases for compromise, or for termination or suspension of collection action, should be set out in detail. Such documentation should be retained in the appropriate claims file.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979]

§ 102.14 Automation.

Agencies should automate their debt collection operations to the extent it is cost effective and feasible.

[44 FR 22702, Apr. 17, 1979]

§ 102.15 Prevention of overpayments, delinquencies, and defaults.

Agencies should establish procedures to identify the causes of overpayments, delinquencies, and defaults and the corrective actions needed. One action that should be considered is the reporting of debts or loans, when first established, to commercial credit bureaus.

[44 FR 22702, Apr. 17, 1979]

§ 102.16 Additional administrative collection action.

Nothing contained in this chapter is intended to preclude the utilization of

any other administrative remedy which may be available.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979]

PART 103—STANDARDS FOR THE COMPROMISE OF CLAIMS

Sec.

- 103.1 Scope and application.
- 103.2 Inability to pay.
- 103.3 Litigative probabilities.
- 103.4 Cost of collecting claim.
- 103.5 Enforcement policy.
- 103.6 Joint and several liability.
- 103.7 Settlement for a combination of reasons.
- 103.8 Further review of compromise offers.
- 103.9 Restrictions.

AUTHORITY: Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

SOURCE: 31 FR 13382, Oct. 15, 1966, unless otherwise noted.

§ 103.1 Scope and application.

The standards set forth in this part apply to the compromise of claims, pursuant to section 3(b) of the Federal Claims Collection Act of 1966, 80 Stat. 309, which do not exceed \$20,000 exclusive of interest. The head of an agency or his designee may exercise such compromise authority with respect to claims for money or property arising out of the activities of his agency prior to the referral of such claims to the General Accounting Office or to the Department of Justice for litigation. The Comptroller General or his designee may exercise such compromise authority with respect to claims referred to the General Accounting Office prior to their further referral for litigation. Only the Comptroller General or his designee may effect the compromise of a claim that arises out of an exception made by the General Accounting Office in the account of an accountable officer, including a claim against the payee, prior to its referral by that Office for litigation.

§ 103.2 Inability to pay.

A claim may be compromised pursuant to this part if the Government cannot collect the full amount because of (a) the debtor's inability to pay the full amount within a reasonable time,

or (b) the refusal of the debtor to pay the claim in full and the Government's inability to enforce collection in full within a reasonable time by enforced collection proceedings. In determining the debtor's inability to pay the following factors, among others, may be considered: Age and health of the debtor; present and potential income; inheritance prospects; the possibility that assets have been concealed or improperly transferred by the debtor; the availability of assets or income which may be realized upon by enforced collection proceedings. The agency will give consideration to the applicable exemptions available to the debtor under State and Federal law in determining the Government's ability to enforce collection. Uncertainty as to the price which collateral or other property will bring at forced sale may properly be considered in determining the Government's ability to enforce collection. A compromise effected under this section should be for an amount which bears a reasonable relation to the amount which can be recovered by enforced collection procedures, having regard for the exemptions available to the debtor and the time which collection will take. Compromises payable in installments are to be discouraged. However, if payment of a compromise by installments is necessary, an agreement for the reinstatement of the prior indebtedness less sums paid thereon and acceleration of the balance due upon default in the payment of any installment should be obtained, together with security in the manner set forth in § 102.8 of this chapter, in every case in which this is possible. If the agency's files do not contain reasonably up-to-date credit information as a basis for assessing a compromise proposal such information may be obtained from the individual debtor by obtaining a statement executed under penalty of perjury showing the debtor's assets and liabilities, income and expense. Forms such as Department of Justice form DJ-35 may be used for this purpose. Similar data may be obtained from corporate debtors by resort to balance sheets and such additional data as seems required.

§ 103.3 Litigative probabilities.

A claim may be compromised pursuant to this part if there is a real doubt concerning the Government's ability to prove its case in court for the full amount claimed either because of the legal issues involved or a bona fide dispute as to the facts. The amount accepted in compromise in such cases should fairly reflect the probability of prevailing on the legal question involved, the probabilities with respect to full or partial recovery of a judgment having due regard to the availability of witnesses and other evidentiary support for the Government claim, and related pragmatic considerations. Proportionate weight should be given to the probable amount of court costs which may be assessed against the Government if it is unsuccessful in litigation, having regard for the litigative risks involved. Cf. 28 U.S.C. 2412, as amended by Pub. L. 89-507, 80 Stat. 308.

§ 103.4 Cost of collecting claim.

A claim may be compromised pursuant to this part if the cost of collecting the claim does not justify the enforced collection of the full amount. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time which it will take to effect collection. Cost of collecting may be a substantial factor in the settlement of small claims. The cost of collecting claims normally will not carry great weight in the settlement of large claims.

§ 103.5 Enforcement policy.

Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon. Mere accidental or technical violations may be dealt with less severely than willful and substantial violations.

§ 103.6 Joint and several liability.

When two or more debtors are jointly and severally liable collection action will not be withheld against one such debtor until the other or others pay their proportionate share. The agency should not attempt to allocate the burden of paying such claims as between the debtors but should proceed to liquidate the indebtedness as quickly as possible. Care should be taken that compromise with one such debtor does not release the agency's claim against the remaining debtors. The amount of a compromise with one such debtor shall not be considered a precedent or as morally binding in determining the amount which will be required from other debtors jointly and severally liable on the claim.

§ 103.7 Settlement for a combination of reasons.

A claim may be compromised for one or for more than one of the reasons authorized in this part.

§ 103.8 Further review of compromise offers.

If an agency holds a debtor's firm written offer of compromise which is substantial in amount and the agency is uncertain as to whether the offer should be accepted, it may refer the offer, the supporting data, and particulars concerning the claim, to the General Accounting Office or to the Department of Justice. The General Accounting Office or the Department of Justice may act upon such an offer or return it to the agency with instructions or advice.

§ 103.9 Restrictions.

Neither a percentage of a debtor's profits nor stock in a debtor corporation will be accepted in compromise of a claim. In negotiating a compromise with a business concern consideration should be given to requiring a waiver of the tax-loss-carry-forward and tax-loss-carry-back rights of the debtor.

PART 104—STANDARDS FOR SUSPENDING OR TERMINATING COLLECTION ACTION

Sec.

- 104.1 Scope and application.
- 104.2 Suspension of collection activity.
- 104.3 Termination of collection activity.
- 104.4 Transfer of claims.

AUTHORITY: Sec. 3, 80 Stat. 309, 31 U.S.C. 952.

SOURCE: 31 FR 13383, Oct. 15, 1966, unless otherwise noted.

§ 104.1 Scope and application.

The standards set forth in this part apply to the suspension or termination of collection action pursuant to section 3(b) of the Federal Claims Collection Act of 1966, 80 Stat. 309, on claims which do not exceed \$20,000 exclusive of interest. The head of an agency or his designee may suspend or terminate collection action under this part with respect to claims for money or property arising out of activities of his agency prior to the referral of such claims to the General Accounting Office or to the Department of Justice for litigation. The Comptroller General or his designee may exercise such authority with respect to claims referred to the General Accounting Office prior to their further referral for litigation.

§ 104.2 Suspension of collection activity.

Collection action may be suspended temporarily on a claim when the debtor cannot be located after diligent effort and there is reason to believe that future collection action may be sufficiently productive to justify periodic review and action on the claim having consideration for its size and the amount which may be realized thereon. The following sources may be of assistance in locating missing debtors: Telephone directories; city directories; postmasters; drivers' license records; automobile title and license records; state and local governmental agencies; district directors of Internal Revenue; other Federal agencies; employers, relatives, friends; credit agency skip locate reports; and credit bureaus. Suspension as to a particular debtor should not defer the early liquidation of security for the debt.

Every reasonable effort should be made to locate missing debtors sufficiently in advance of the bar of the applicable statute of limitations, such as Pub. L. 89-505, 80 Stat. 304, to permit the timely filing of suit if such action is warranted. If the missing debtor has signed a confess-judgment note and is in default, referral of the note for the entry of judgment should not be delayed because of his missing status. Collection action may be suspended temporarily on a claim when the debtor owns no substantial equity in realty and is unable to make payments on the Government's claim or effect a compromise thereof at the time but his future prospects justify retentions of the claim for periodic review and action and (a) the applicable statute of limitations has been tolled or started running anew or (b) future collection can be effected by offset notwithstanding the statute of limitations.

[31 FR 13383, Oct. 15, 1966, as amended at 44 FR 22702, Apr. 17, 1979]

§ 104.3 Termination of collection activity.

The head of an agency or his designee may terminate collection activity and consider the agency's file on the claim closed under the following standards:

(a) *Inability to collect any substantial amount.* Collection action may be terminated on a claim when it becomes clear that the Government cannot collect or enforce collection of any significant sum from the debtor having due regard for the judicial remedies available to the Government, the debtor's future financial prospects, and the exemptions available to the debtor under State and Federal law. In determining the debtor's inability to pay the following factors, among others, may be considered: Age and health of the debtor; present and potential income; inheritance prospects; the possibility that assets have been concealed or improperly transferred by the debtor; the availability of assets or income which may be realized upon by enforced collection proceedings.

(b) *Inability to locate debtor.* Collection action may be terminated on a claim when the debtor cannot be located, there is no security remaining to be liquidated, the applicable statute

of limitations has run, and the prospects of collecting by offset notwithstanding the bar of the statute of limitations is too remote to justify retention of the claim.

(c) *Cost will exceed recovery.* Collection action may be terminated on a claim when it is likely that the cost of further collection action will exceed the amount recoverable thereby.

(d) *Claim legally without merit.* Collection action should be terminated on a claim whenever it is determined that the claim is legally without merit.

(e) *Claim cannot be substantiated by evidence.* Collection action should be terminated when it is determined that the evidence necessary to prove the claim cannot be produced or the necessary witnesses are unavailable and efforts to induce voluntary payment are unavailing.

§ 104.4 Transfer of claims.

When an agency has doubt as to whether collection action should be suspended or terminated on a claim it may refer the claim to the General Accounting Office for advice. When a significant enforcement policy is involved in reducing a statutory penalty or forfeiture to judgment, or recovery of a judgment is a prerequisite to the imposition of administrative sanctions, such as the suspension or revocation of a license or the privilege of participating in a Government sponsored program, an agency may refer such a claim for litigation even though termination of collection activity might otherwise be given consideration under § 104.3 (a) or (c). Claims on which an agency holds a judgment by assignment or otherwise will be referred to the Department of Justice for further action if renewal of the judgment lien or enforced collection proceedings are justified under the criteria discussed in this part, unless the agency concerned has statutory authority for handling its own litigation.

PART 105—REFERRALS TO GAO OR FOR LITIGATION

Sec.

- 105.1 Prompt referral.
- 105.2 Current address of debtor.
- 105.3 Credit data.

- Sec.
 105.4 Report of prior collection actions.
 105.5 Preservation of evidence.
 105.6 Minimum amount of referrals to the Department of Justice.
 105.7 Referrals to GAO.

AUTHORITY. Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

SOURCE: 31 FR 13384, Oct. 15, 1966, unless otherwise noted.

§ 105.1 Prompt referral.

Claims on which collection action has been taken in accordance with Part 102 of this chapter and which cannot be compromised, or on which collection action cannot be suspended or terminated, in accordance with Parts 103 and 104 of this chapter, will be referred to the General Accounting Office in accordance with R.S. 236, as amended, 31 U.S.C. 71, or to the Department of Justice, if the agency concerned has been granted an exception from referrals to the General Accounting Office. Such referrals should be made as early as possible consistent with aggressive agency collection action and the observance of the regulations contained in this chapter and in any event well within the time limited for bringing a timely suit against the debtor.

§ 105.2 Current address of debtor.

Referrals to the General Accounting Office, and to the Department of Justice for litigation, will be accompanied by the current address of the debtor or the name and address of the agent for a corporation upon whom service may be made. Reasonable and appropriate steps will be taken to locate missing parties in all cases. Referrals to the General Accounting Office, and referrals to the Department of Justice for the institution of foreclosure or other proceedings, in which the current address of any party is unknown will be accompanied by a listing of the prior known addresses of such a party and a statement of the steps taken to locate him.

§ 105.3 Credit data.

(a) Claims referred to the General Accounting Office, and to the Department of Justice for litigation, will be accompanied by reasonably current

credit data indicating that there is a reasonable prospect of effecting enforced collections from the debtor, having due regard for the exemptions available to the debtor under State and Federal law and the judicial remedies available to the Government.

(b) Such credit data may take the form of (1) a commercial credit report, (2) an agency investigative report showing the debtor's assets and liabilities and his income and expenses, (3) the individual debtor's own financial statement executed under penalty of perjury reflecting his assets and liabilities and his income and expenses, or (4) an audited balance sheet of a corporate debtor.

(c) Such credit data may be omitted if (1) a surety bond is available in an amount sufficient to satisfy the claim in full, (2) the forced sale value of the security available for application to the Government's claim is sufficient to satisfy its claim in full, (3) the referring agency wishes to liquidate loan collateral through judicial foreclosure but does not desire a deficiency judgment, (4) the debtor is in bankruptcy or receivership, or (5) the debtor's liability to the Government is fully covered by insurance, in which case the agency will furnish such information as it can develop concerning the identity and address of the insurer and the type and amount of insurance coverage.

§ 105.4 Report of prior collection actions.

A checklist or brief summary of the actions previously taken to collect or compromise a claim will be forwarded with the claim upon its referral to the General Accounting Office or to the Department of Justice. If any of the administrative collection actions enumerated in Part 102 of this chapter have been omitted, the reason for their omission will be given with the referral. The General Accounting Office and the Department of Justice may return or retain claims at their option when there is insufficient justification for the omission of one or more of the administrative collection actions enumerated in Part 102 of this chapter.

§ 105.5 Preservation of evidence.

Care will be taken to preserve all files, records and exhibits on claims referred or to be referred to the General Accounting Office, or to the Department of Justice for litigation.

§ 105.6 Minimum amount of referrals to the Department of Justice.

Agencies will not refer claims of less than \$600, exclusive of interest for litigation unless (a) referral is important to a significant enforcement policy or (b) the debtor has not only the clear ability to pay the claim but the Gov-

ernment can effectively enforce payment having due regard to the exemptions available to the debtor under State or Federal Law and the judicial remedies available to the Government.

(42 FR 38891, Aug. 1, 1977)

§ 105.7 Referrals to GAO.

Referrals of claims to the General Accounting Office will be in accordance with instructions, including monetary limitations, contained in the General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies.

APPENDIX 4

Interview Topical Guideline

1. Characterize the types of pollution sources in your district that became Federal Spills.

2. What is your perception of the law, its defenses, and the polluters responsibility with respect to removal? Is it a good law? Does it place the proper amount of responsibility on the polluter? Do these results measure up to what you feel is the spirit of the law?

3. To what extent does the law compel, or provide incentive for, the polluter to perform removal? And conversely, do aspects of the law discourage the polluter from taking action thereby encouraging Federal spills and placing the burden of cost recovery on the shoulders of the government?

4. Are there any standard methods or guidelines for district personnel to follow when attempting to collect Federal spill expenditures? (If so, send a copy) Describe the (or other) procedure noting areas where it has been improved and where administrative problems exist. (Send copies of forms, letters, etc.)

a. Time elements of procedure

b. Does cleanup collection hinge on the penalty assessment procedure in any way? Describe.

c. Are collection procedures for the more expensive Federal spills any different than routine spill procedure? If so, is this in writing or informal? Explain.

d. Approximately how big is your caseload and how many are over one year old?

e. Do you follow the disposition of cases that are forwarded to HQ or DOJ? How?

f. Are debtors reported to commercial credit bureaus? Are there procedures for doing so (7 CFR Section 102.4)? Is this action threatened?

g. What, if any, affirmative effort is made to interview the debtor?

h. Are any other actions used against debtors?

i. How are your debt collection operations set up? (Automated?)

5. To what extent has the quality of the field investigation been detrimental to the collection process?

6. What if any, feedback is provided to the field units about their investigative work?

7. From a personal viewpoint (beyond what is found in 4 CFR) characterize the circumstances under which a removal would be compromised. What criteria are

used and how often are Federal spill recoveries compromised?

8. How are your relations with the U.S. Attorney? Does he accept collection cases? What complaints does the U.S. Attorney bring to your attention, i.e., state evidence?

9. What is your perception of the polluter's response to the law, their responsibility, and our actions.

10. Are you aware of any formal or informal assessments of our collection track record? If so, what are they?

11. Are you aware of any other feedback that directed or suggested changes to improve the collection system?

12. As an attorney with your knowledge of the law and its administration, how would you advise your client to react to a Coast Guard request that he clean up his oil spill?

13. Do you have any other feelings about the current law and administrative system?

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